No. 22607

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

Appellees.

Appeal From the United States District Court
Central District of California.

BRIEF FOR APPELLANT.

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Appellees.

Appeal From the United States District Court
Central District of California.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an appeal from a judgment entered on December 18, 1967, by the United States District Court for the Central District of California [R. 189, 190].

Notice of Appeal was filed by plaintiff Athalie Irvine Smith on December 18, 1967 [R. 187, 188]. Pleadings in the District Court consist of: Amended complaint of plaintiff [R. 4 to 29]; answer of the respective defendants to plaintiff's amended complaint [R. 46 to 78; R. 79 to 85; R. 110-A to 110-F; R. 111 to 115; R. 116 to 121; R. 122 to 129]; reply of plaintiff to affirmative defenses contained in defendants' answers [R. 86 to 104; R. 105 to 107; and R. 130 to 134].

Athalie Irvine Smith, plaintiff in said action in the District Court, is an heir at law and a beneficiary under the will of James Irvine, deceased, who was plaintiff's paternal grandfather. Said action was commenced August 10, 1966. Plaintiff alleged in said amended complaint that the indenture of trust executed by James Irvine, as trustor, and The James Irvine Foundation, as trustee, on February 24, 1937, was invalid or void, and that the 510 shares of the corporate stock of The Irvine Comany, the corpus described in said indenture of trust, belonged to the heirs of James Irvine, deceased, or the beneficiaries under the will of said decedent.

The District Court's jurisdiction was invoked under 28 U.S.C., Sec. 1332, and is based upon diversity of citizenship. Plaintiff is a citizen of the State of Virginia. All of the defendants for federal court jurisdictional purposes are citizens of the State of California [R. 139].

The value of 459 shares of stock in The Irvine Company involved in the plaintiff's action exceeded 100 million dollars.

This court's jurisdiction rests upon 28 U.S.C., Sec. 1291.

Pursuant to stipulation of all parties to this appeal and by order of this court, appellant has to June 1, 1968 to file appellant's brief; appellees have to August 1, 1968 to file appellees' brief; and appellant has to August 20, 1968 to file appellant's reply brief.

Statement of Plaintiff's Case and Plaintiff's Contentions in the District Court, and Points, Issues and Questions Involved in Plaintiff's Appeal.

Plaintiff and appellant Athalie Irvine Smith contends that the trust created by the indenture of trust executed on February 24, 1937 was illegal and void and as such either no title passed to The James Irvine Foundation, as trustee, or there was a resulting trust in favor of the trustor James Irvine as resulting trust beneficiary, and since his death for his heirs.

The trust was illegal and void because:

1. The trust was not a legally charitable trust because it provided in part for distribution of income for purposes not public and charitable but private and non-charitable and also for purposes and uses of the trust income in the absolute discretion of the trustee that may be either private or charitable, all to be paid from the total income from the same trust corpus during the same period of time, and no means were provided or legally possible for separation or division or allocation between charitable and non-charitable purposes. The trust was solely an income trust.

2. The trust was illegal because it provided for the corpus of the trust property (the Irvine Company stock) to be held in trust in perpetuity (forever) and the beneficial interest was never to vest in any beneficiary, and its purposes were not legally charitable. The trust was, therefore, prohibited by Article XX, Section 9, of the California Constitution, which reads:

> "No perpetuities shall be allowed except for eleemosynary purposes."

3. The trust was illegal because it provided for distribution of income possible to vest in the future beyond the period of time allowed by the rule against perpetuities, and for purposes not legally charitable, and the trust therefore was prohibited by the above described provision of the California Constitution.

4. The trust was illegal and void because it provided that the corpus of the trust property (Irvine Company stock) was never to be alienated except in exchange for other property or funds to become part of the same trust *res,* and its purposes were not legally charitable, and the trust therefore violated California Civil Code, Sections 715, 716 and 771 and was illegal and void as in restraint of alienation.

5. The trust was illegal and void because it provided for the holding of property and the distribution of income for purposes not legally charitable beyond the period of time permitted as legal as provided in California Civil Code, Sections 715, 716 and 771.

6. The trust was an express trust and in its entirety was illegal and void, and because thereof there was a resulting trust in favor of the trustor (the real owner as the resulting trust beneficiary), and after his death in favor of his heirs, to wit, the plaintiff and her three cousins Kathryn Lillard Wheeler, Linda Irvine Gaede and James Myford Irvine as the surviving heirs of James Irvine, Deceased. The trust was an express trust and was always recognized as such by The James Irvine Foundation, as trustee, and therefore it was never repudiated by said trustee. Said defendant Foundation, as trustee, could never get title so long as it always claimed to hold the Irvine stock for the benefit of others and never adversely for itself.

7. James Irvine, as trustor, had no intention of divesting himself of the title to or the control or dominion over the 510 shares of the Irvine Company stock during his lifetime.

8. James Irvine never intended that the title to the Irvine Company stock would pass *in praesenti* to The James Irvine Foundation, as trustee.

9. There was no effective delivery of the Irvine stock or the indenture of trust to The James Irvine Foundation, as trustee, during the lifetime of James Irvine.

10. The purported delivery of the Irvine Company stock and/or the indenture of trust was ineffective because said trust was testamentary and not intended by James Irvine to be effective or operative or absolute until after his death.

11. The trust was illusory and therefore void.

12. The 1937 indenture of trust created a mere agency and not a true trust.

13. The transfer in trust was colorable.

14. James Irvine, the trustor, died intestate as to the 510 shares of Irvine stock and it was the expressed intention of James Irvine that the Irvine stock *would not* be included under the provisions of his last will.

15. The last will of James Irvine, in the omnibus residuary clause thereof, provided in effect that in the event the trust was held illegal and void the Irvine stock shall be distributed to the plaintiff and the other heirs at law of James Irvine, Deceased.

16. The trust was mixed and contained both charitable and non-charitable provisions which are so blended together as to be inseparable, and the trust is therefore illegal and void.

17. The trust was an attempted testamentary disposition of the Irvine stock by the trustor (owner) James Irvine, and is therefore illegal and void.

In compliance with Rule 18, Subparagraph C, the foregoing points, issues and questions that are involved in this appeal, and the record references supporting each statement of fact and the evidence in support thereof and the applicable law thereto, will be fully set forth under the appropriate chapters of this brief.

Specification of Errors Relied Upon.

1. The District Court erred in granting judgment for defendants [R. 189-190].

2. The District Court erred in dismissing plaintiff's amended complaint with prejudice [R. 189-190].

3. The District Court erred in entering judgment "that the indenture of trust dated February 24, 1937 established a valid trust for charitable purposes" [R. 189-190].

4. The District Court erred in entering judgment "that The James Irvine Foundation, as trustee of that trust, has valid title to 459 shares of stock of The Irvine Company" [R. 189-190].

5. The District Court erred in entering judgment "that none of the heirs-at-law of James Irvine and none of the beneficiaries under his will have any right or title to, or any interest in, those shares" [R. 189-190].

6. The District Court erred in entering judgment "that the plaintiff's amended complaint be and the

same is hereby dismissed with prejudice; and that final judgment herein be and the same is hereby rendered in favor of the defendants" [R. 189-190].

7. The District Court erred in entering judgment "that the taxable costs of the action be and they are hereby assessed against the plaintiff." [R. 189-190].

8. The District Court erred in concluding that "under the indenture of trust dated February 24, 1937 a valid trust for charitable purposes was established" [R. 185].

9. The District Court erred in concluding that "The James Irvine Foundation, as trustee of that trust, has valid title to 459 shares of stock of The Irvine Company" [R. 185].

10. The District Court erred in concluding that "none of the heirs at law of James Irvine and none of the beneficiaries under the will have any right or title to, or any interest in, those shares" [R. 185].

11. The District Court erred in ordering that judgment shall be entered "Adjudging that the indenture of trust dated February 24, 1937, established a valid trust for charitable purposes" [R. 185].

12. The District Court erred in ordering that judgment shall be entered "adjudging that The James Irvine Foundation as trustee of that trust has valid title to 459 shares of stock of The Irvine Company." [R. 185].

13. The District Court erred in ordering that judgment shall be entered "adjudging that none of the heirs at law of James Irvine and none of the beneficiaries

under his will have any right or title to, or any interest in, those shares." [R. 186].

14. The District Court erred in ordering that judgment shall be entered "Dismissing the plaintiff's amended complaint with prejudice and rendering final judgment herein in favor of defendants" [R. 186].

15. The District Court erred in ordering that judgment shall be entered "Assessing the taxable costs of this action against the plaintiff" [R. 186].

16. The findings of fact of the District Court are clearly erroneous [R. 137-186, incl.].

17. The District Court erred in sustaining the objections of the defendants that the court was not required or should not take judicial notice of the Report to Subcommittee Chairman's Report to Subcommittee No. 1, Select Committee on Small Business, House of Representatives, Ninetieth Congress, entitled Tax Exempt Foundations and Charitable Trusts: Impact on our Economy, Fifth Installment, Dated April 28, 1967, and containing 1129 pages devoted exclusively to the investigation of The James Irvine Foundation, as trustee, by said Congressional Committee, which said report was filed with the District Court by the plaintiff upon the ground that the court was required to take judicial notice of the contents of said report [R. 135, 136].

The Findings of Fact Made by the District Court Are Contained in the Memorandum of Said Court [R. 137-186], but Said Findings Are Not Numbered, Therefore the Same Will Be Referred to by the Page Numbers of the Record Filed Herein on Which Said Findings Are Set Forth as Follows:

1. The finding of fact of the District Court that on November 7, 1947, following the death of James Irvine, E. M. Price, as the secretary and treasurer of The James Irvine Foundation, as trustee, sent in for transfer to the Foundation, as trustee, the certificates of Irvine Company stock described in said finding, is clearly erroneous [R. 155; R. 167].

Argument.

This finding states that said certificates of Irvine Company stock were sent by E. M. Price in her capacity as secretary and treasurer of The James Irvine Foundation, as trustee, to the Irvine Company for transfer to the Irvine Foundation, as trustee, whereas the only evidence in the record concerning said purported transfer is Exhibit D-2 [Tr. 2328], the letter dated November 7, 1947 from E. M. Price to Mr. Hellis, secretary of the Irvine Company, which letter is on the stationery letterhead of the Estate of James Irvine, 820 Crocker Building, San Francisco, and is signed by E. M. Price, secretary, which is the capacity in which E. M. Price sent said letter, to wit, secretary to the executors of the Estate of James Irvine. There is no evidence that E. M. Price was acting in her post mortem capacity as secretary and treasurer of The

James Irvine Foundation, as trustee. E. M. Price on November 7, 1947 continued to hold said Irvine Company stock certificates described in said letter in the safe of James Irvine that was located in the office of James Irvine, exactly as she and James Irvine had done for the previous ten years during the lifetime of Mr. Irvine when E. M. Price was Mr. Irvine's secretary and agent and his "dummy" secretary-treasurer of his *alter ego* The James Irvine Foundation. On November 7, 1947, said Irvine Foundation, as trustee, had not yet received the delivery or the possession of said Irvine Company stock certificates for the reason that the possession thereof and the title thereto was physically and as a matter of law vested in the executors of the decedent James Irvine, to wit, Myford Irvine, his son, Mrs. Katharine Brown Irvine, his widow, and Robert H. Gerdes, his attorney. Their secretary and agent was E. M. Price, and she acted for the executors in the same capacity in which she had served James Irvine as secretary and agent during his lifetime. The said executors of the Estate of James Irvine stepped into the shoes of the decedent James Irvine and took possession of all of the assets of said decedent, including the 510 shares of the Irvine Company stock, and E. M. Price merely changed her title and her position to secretary to said executors from that of secretary to James Irvine during his lifetime.

2. The implied finding of fact of the District Court that said Irvine Company stock certificates were accompanied by the consents of the inheritance tax departments of the State of California and the State of West Virginia and that said consents expressly authorized the transfer of said stock certificates from the name of the decedent James Irvine to the name of The James Irvine Foundation, as trustee, is clearly erroneous [R. 155].

Argument.

The consent of the Controller of the State of California dated November 5, 1947 [Ex. B-7, Tr. 2081] is directed to The Irvine Company and merely states, "In re James Irvine, Deceased, pursuant to Article 30 page 968 of Section 2 of the Revenue and Taxation Code, the Controller of the State of California and the Treasurer of the City and County of San Francisco do hereby consent to the transfer of 510 shares of the stock of your company now standing in the name of the above decedent". Said consent does not direct or authorize the executors or The Irvine Company to transfer any certificates of its stock to The James Irvine Foundation or any other identified individual or corporation, and said consent further indicated that said stock was an asset of James Irvine, Deceased, and stood in the name of said decedent. This is merely a formal printed release which authorized the transfer of said stock as an asset of James Irvine, Deceased, and does not have any effect whatever upon the title to said stock as being vested in The James Irvine Foundation. It merely released the transfer of said stock from the lien of the Controller of the State of California whenever the court ordered the transfer, and is commonly issued in any estate where it appears that the remaining assets in the estate are sufficient to pay the inheritance taxes due the State of California, which was no problem in the Estate of James Irvine because said remaining assets of said estate were appraised at approximately 8 million dollars [Ex. B-15, Tr. 2084].

The James Irvine Foundation, as trustee, under the indenture of trust dated February 24, 1937 [Ex. A-1, Tr. 3674], was a complete stranger to the Estate of James Irvine, Deceased. The above named executors of the Irvine Estate stood in a conflict of interest position

because they were simultaneously directors, members and trustees of The James Irvine Foundation. Said executors acted illegally in transferring said Irvine Company stock from the Estate of James Irvine to The James Irvine Foundation.

The executors had no authority to transfer said Irvine Company stock from the Estate of James Irvine to said Foundation unless ordered to do so by the court through a judgment entered in an adversary proceeding by said Irvine Foundation against said executors of the Estate of James Irvine, Deceased. See the following authorities:

Auslen, et al. v. Superior Court, 27 Cal. Rptr. 8;

Crocker First Nat. Bank of S. F. v. Horgan, 74 Cal. App. 2d 917; 170 P. 2d 115;

Roberts v. Roberts, U.S. Court of Appeals (9th Cir.), 286 F. 2d 647;

Tooley v. Commissioner of Internal Revenue (U.S. Court of Appeals 9th Cir.), 121 Fed. Rptr. 2d 350.

Neither does the certificate of consent of the tax commissioner of the State of West Virginia [Ex. B-5, Tr. 2081] authorize the transfer of the Irvine Company stock certificates to The James Irvine Foundation, as trustee. It is merely a consent to the transfer of said Irvine Company stock certificates and is restricted to the personal representatives of said estate or to such person or persons as may be designated by said representatives. Again, this consent has no relationship whatever to the title to the Irvine Company stock being vested in The James Irvine Foundation, as trustee, prior to the death of James Irvine. The Irvine Company stock certificates were not transferred

on the books of The Irvine Company from the name of James Irvine to the name of The James Irvine Foundation until November 18, 1947 [Ex. D-1, Tr. 2325].

3. The finding of fact of the District Court that the record is silent as to the facts and circumstances which surrounded the surrender of certificates Nos. 33 and 42 for 132 shares and 41 shares, respectively, of Irvine Company stock on April 21, 1941 and the issuance of seven new certificates by The Irvine Company to James Irvine for a total of 173 shares of Irvine Company stock in lieu thereof, is clearly erroneous [R. 165].

Argument.

The substantial evidence in the case with reference to the possession of said certificates Nos. 33 and 42 is that on April 21, 1941 Mr. Irvine personally surrendered both of said certificates to the Irvine Company and new certificates Nos. 45, 46, 47 and 48 for 10 shares each, certificates Nos. 49 and 50 for 5 shares each, and certificate No. 51 for 132 shares, a total of 173 shares, were issued to and received by James Irvine personally. Contrary to said finding that the record is silent concerning the circumstances surrounding the surrender of said certificates Nos. 33 and 42, and the issuance of said new certificates above described, the substantial evidence which is uncontradicted consists of plaintiff's Exhibit 11 [Tr. 3650], which contains copies of all of the stock certificates of The Irvine Company, and the stockholders certificate record showing the stockholders' names and the numbers of the certificates and the amount of shares owned by each stockholder. This plaintiff's Exhibit 11 discloses at the bottom of page 4 of the stockholders

certificate record that on April 21, 1941, James Irvine personally surrendered certificate No. 33 for 132 shares of Irvine Company stock. From a comparison of the signature of "James Irvine" with several other signatures of James Irvine on said stockholders certificate record sheets it is obvious that Mr. Irvine personally surrendered said stock certificate No. 33. On page 6 of said stockholders certificate record appears an entry which shows that on April 21, 1941, James Irvine personally surrendered certificate No. 42 for 41 shares of Irvine Company stock as here again James Irvine's own signature appears on said stockholders certificate record, and on page 7 of said stockholders certificate record there is a further entry that there were issued to James Irvine on April 21, 1941, certificates Nos. 45, 46, 47, and 48 for 10 shares each, certificates Nos. 49 and 50 for 5 shares each, and on page 9 of said stockholders certificate record appears Certificate No. 51 for 123 shares, a total of 173 shares. Each of the new certificates of Irvine stock above described was issued in the name of James Irvine on April 21, 1941, and each was signed by James Irvine as president of The Irvine Company. The substantial evidence is that on April 26, 1941 James Irvine was present at his home in Tustin, Orange County, California, and that on said date he attended a special meeting of the board of directors of The Irvine Company that was held at the office of the company near Tustin, California. It is therefore conclusive that James Irvine was present in person and personally surrendered certificates Nos. 33 and 42 to The Irvine Company on April 21, 1941, and personally received in lieu thereof the new certificates which were issued on the same date, to wit, April 21, 1941 [Ex. 2, Tr. 3647]. The fact that Mr. Irvine broke certificates 33 and 42 into 7 new certifi-

cates in denominations as small as 5 and 10 shares on April 21, 1941, is substantial evidence that he never intended that the title to Irvine stock certificates 33 and 42 passed to The Irvine Foundation as trustee *in praesenti.* Furthermore, the possession by Mr. Irvine of certificates 33 and 42 on April 21, 1941, also supports the contention of the plaintiff that Mr. Irvine during his entire lifetime had the possession either personally or through his agent, E. M. Price, of all of said three certificates Nos. 28, 33 and 42 for the 505 shares of Irvine stock that are described in the indenture of trust.

There is no evidence whatever that any of the above described certificates were ever delivered at any time by Mr. Irvine to either Myford Irvine or E. M. Price, as president and secretary, respectively, of the Irvine Foundation, as trustee, during Mr. Irvine's lifetime; and if they had been delivered by him to said parties such delivery would have been under the same circumstances as the alleged original delivery of certificates Nos. 28, 33 and 42, to wit, as employees and agents of James Irvine and his "dummy" officers of the Foundation corporation. The further substantial evidence which is undisputed is defendants' Exhibit D-2 [Tr. 2328], a letter dated November 7, 1947 from E. M. Price to Mr. Hellis, as secretary of The Irvine Company, which letter discloses that E. M. Price, as secretary to the executors of the Estate of James Irvine, had the possession of all of the Irvine Company certificates of stock described in said letter and which totaled 510 shares, on November 7, 1947. The evidence in the case is conclusive that from the time it is alleged by The James Irvine Foundation that The Irvine Company stock was delivered in 1937, whether the same was allegedly delivered to Myford Irvine as "dummy" presi-

dent, or to E. M. Price as "dummy", secretary-treasurer of the Irvine Foundation, said Irvine Company stock so allegedly delivered to them was delivered to them in their capacity as employees and agents of James Irvine and as a depositary. Under these circumstances the Irvine Company stock at all times subsequent to 1937 remained in the possession of James Irvine and /or E. M. Price as his agent and was kept in the safe located in the office of James Irvine during his entire lifetime. After the death of Mr. Irvine on August 24, 1947 said Irvine Company stock continued to remain in the agency custody of E. M. Price as secretary to the executors of the Irvine estate [Ex. D-2, Tr. 2328]. There is no substantial evidence in the record that established that at any time during the lifetime of Mr. Irvine or after his death did said certificates of Irvine Company stock ever leave the possession of Mr. Irvine and/or his agent E. M. Price until November 7, 1947. No matter how many hats Myford Irvine or E. M. Price wore to represent the interests of James Irvine in his various enterprises and corporations, including his *alter ego* The James Irvine Foundation, they held their offices and titles as the "dummies" and "tools" of their employer James Irvine, and as the agents of James Irvine said parties were at all times subject to his dominion and control.

4. The finding of fact of the District Court that for the sole and restricted purpose of control of The Irvine Company, in connection with salaries voted the officers and for all other income tax purposes, James Irvine would be regarded *only* by the Internal Revenue Service as the owner of 510 shares of Irvine stock, is clearly erroneous [R. 164; R. 166; R. 167].

There is no evidence whatever to support this finding and both the Federal and California income tax returns of The Irvine Company were sworn to by either James Irvine, as president, or by some other executive of The Irvine Company, and were based upon the records of both The Irvine Company and James Irvine [Ex. 3, Tr. 3647]. This representation of stock ownership is unqualified and means exactly what it states: That James Irvine was the owner of 547 shares of Irvine Company stock. The 510 shares of Irvine Company stock that are involved in this case were included in said figure of 547 shares. No regulations or instructions of the Internal Revenue Service were introduced in evidence, or even exist that support said finding. Furthermore, said finding completely disregards the substantial evidence in the case that, in addition to the representation in the income tax returns schedules "F" and "G" of the absolute ownership of 547 shares of Irvine Company stock by James Irvine, there was also the voluntary declaration of James Irvine that was set forth in the balance sheets attached to each of said income tax returns during said 10-year period, as follows:

> "Ownership of company stock. James Irvine owns 547 shares out of a total of 1,000 shares outstanding. This stock was acquired in 1894 and his return is filed in San Francisco where he resides."

The above described documentary evidence is further implemented by the minutes of the annual stockholders meetings of The Irvine Company during said 10-year period which disclose that James Irvine was the owner of 547 shares of Irvine Company stock during said 10-year period, and said minutes further disclose that when James Irvine did not attend any one of said annual stockholders meetings that the said 547 shares of

Irvine Company stock were voted under a written proxy signed by James Irvine, which stated that James Irvine was the owner and held 547 shares of Irvine Company stock [Ex. 2, Tr. 3647.]

5. The finding of fact of the District Court that James Irvine could not have voted the Irvine Company stock involved in the plaintiff's action if said Irvine Company stock had been transferred on the books of The Irvine Company to The James Irvine Foundation, as trustee, is clearly erroneous [R. 166].

Argument.

There is no evidence to support this finding that James Irvine could not have voted The Irvine Company stock if said stock had been transferred on the books of The Irvine Company to the Irvine Foundation, as trustee. The indenture of trust expressly reserved the right to Mr. Irvine to vote the Irvine company stock during his lifetime, which provision in itself constituted a written proxy to Mr. Irvine to vote the 510 shares of Irvine Company stock had said Irvine Company stock been effectively delivered to the Irvine Foundation, as trustee, during the lifetime of James Irvine, and a copy of the indenture of trust had been filed with The Irvine Company.

The substantial evidence established the nondelivery of either the Irvine Company stock or the indenture of trust by James Irvine during his lifetime, otherwise a copy of said indenture of trust would have been filed with The Irvine Company regardless of whether or not the Irvine Company stock certificates were transferred from the name of James Irvine to the name of The James Irvine Foundation, as trustee. The undisputed evidence is that a copy of said indenture of trust was never filed with The Irvine Company until November 13, 1947 [Ex. D-3, Tr. 2937], ten weeks after the death of James Irvine and it is obvious

that said document was not filed during the lifetime of Mr. Irvine with The Irvine Company because said trust was not absolute or operative or effective during his lifetime. Had the title to said stock been transferred by James Irvine during his lifetime to The James Irvine Foundation, as trustee, there is no reason why said trustee would not have caused the stock certificates to be surrendered to The Irvine Company and reissued in the name of said trustee. There is no provision in the indenture of trust which prohibited the trustee from having done so. Under similar circumstances where Mr. Irvine held the plaintiff's 200 shares of Irvine Company stock, as trustee, from 1935 to August 24, 1947, the date of his death, the plaintiff's certificate of stock was issued in the name of James Irvine, as trustee, for Athalie Anita Irvine, and in 1935, when Mr. Irvine established himself as trustee under an indenture of trust that involved 50 shares of Irvine Company stock that he gave to his granddaughter Kathryn Lillard, he followed the same procedure as he did with his granddaughter Athalie Anita Irvine, the plaintiff, and had a certificate for 50 shares of Irvine Company stock issued in his name as trustee for Kathryn Lillard [Ex. 11, Tr. 3650]. The conclusion to be drawn from these circumstances is that the reason neither James Irvine never transferred said 510 shares of Irvine stock to the name of the Irvine Foundation, as trustee, and the only reason that a copy of the indenture of trust was not filed with The Irvine Company, or with the United States Treasury Department during the lifetime of Mr. Irvine was solely because the trust was not to be absolute or operative or effective during the lifetime of James Irvine.

In connection with this finding it is also significant to note that in Exhibit D-3 [Tr. 2937], the letter dated November 13, 1947 on the letterhead stationery of the Estate of James Irvine, from E. M.

Price, as Secretary of the executors of the Estate of James Irvine, to Mr. Hellis, secretary of The Irvine Company, that E. M. Price sends "A True Copy" of the 1937 indenture of trust and a copy of Mr. Irvine's letter dated June 20, 1946 to Mr. Hellis [Ex. A-13, Tr. 3678], which letter of June 20, 1946 refers to five shares of Irvine Company stock. Prior to the sending to The Irvine Company on November 13, 1947, of a copy of the indenture of trust and a copy of Mr. Irvine's letter dated June 20, 1946, no notice was ever given to The Irvine Company that either of said documents or said letter existed, and the records of The Irvine Company, which were under the domination and control of James Irvine, therefore did not contain an entry concerning the purported transfer of the Irvine Company stock by Mr. Irvine to the Irvine Foundation, as trustee. Had this trust transaction been intended by Mr. Irvine to be absolute and operative during his lifetime why did he not follow the same pattern and procedure as he had with the plaintiff's 200 shares of stock, and the 50 shares of stock of Kathryn Lillard which he held as trustee, and had recorded with The Irvine Company notice of the existence of both of said trusts and had the respective certificates of stock issued in his name as trustee. E. M. Price, who was the confidential secretary and agent of Mr. Irvine, as well as his agent and "dummy" secretary and treasurer of the Irvine Foundation, as trustee, knew that Mr. Irvine never intended that said trust would be complete, absolute or operative or effective during the lifetime of Mr. Irvine, and that is the reason that E. M. Price, as the employee and agent of James Irvine, had access to and the custody of the 510 shares of Irvine Company stock and the indenture of trust during the lifetime of James Irvine and following his death, and kept both the stock and the indenture of trust in Mr. Irvine's safe that was located

in the private office of Mr. Irvine. Under these circumstances any possession of the Irvine stock and/or the indenture of trust by E. M. Price would be legally the possession of her employer James Irvine. After the death of Mr. Irvine the possession of said Irvine Company stock and the indenture of trust continued to be accessible to and held by E. M. Price as the secretary of the executors of the estate of James Irvine, Deceased, until November 7, 1947 when she, as such secretary to said executors, sent the certificates representing said 510 shares of Irvine Company stock to The Irvine Company for transfer from the name of James Irvine to the name of The James Irvine Foundation. It will be recalled that the letter of E. M. Price [Ex. D-2, Tr. 3528] dated November 7, 1947, was on the stationery letterhead of the Estate of James Irvine and was signed by E. M. Price as secretary, which was in her capacity as secretary to the executors of the Irvine estate, and said letter was not signed by her, as stated in the finding of the District Court, as secretary and treasurer of The James Irvine Foundation.

6. The finding of fact of the District Court that the indenture of trust was not found in the safe deposit boxes of James Irvine at the time of his death and that there is lacking any evidence showing the possession of the indenture of trust by James Irvine following its execution and/or that said indenture of trust was in the possession of the Foundation at all times before and shortly following the death of James Irvine on August 24, 1947, is clearly erroneous [R. 166-167].

Argument.

There is no evidence in the case whatever to support this implied finding that James Irvine at any time effectively delivered the indenture of trust.

Neither N. Loyall McLaren nor Robert H. Gerdes, the only witnesses who testified to the alleged conversations with Mr. Irvine concerning the delivery of the Irvine Company stock, made any mention at all about any conversation with James Irvine concerning the delivery of the indenture of trust. The only evidence introduced by the defendants concerning the possession of said indenture of trust consists of the minutes of a special meeting of the directors of the Irvine Foundation that was held on September 19, 1947, following the death of Mr. Irvine on August 24, 1947 [Ex. A-14, Tr. 3678]. These minutes disclosed that at this meeting the indenture of trust was in the possession of E. M. Price. The inference to be drawn from said minutes is that E. M. Price, as the confidential secretary and agent of James Irvine, had kept said indenture of trust in the safe at Mr. Irvine's office where she had also kept the Irvine Company stock certificates, and that her possession of the Irvine Company stock and/or the indenture of trust, as the agent of Mr. Irvine during his lifetime, continued as the agent of the executors of the Estate of James Irvine after he died, which inference is supported by Exhibits D-2 [Tr. 2328] and D-3 [Tr. 2937], the letters from E. M. Price to Mr. Hellis, as secretary of The Irvine Company, dated respectively November 7, 1947 and November 13, 1947. Both of said letters were on the stationery letterhead of the Estate of James Irvine and signed by E. M. Price as secretary to said executors, and not as secretary of The James Irvine Foundation. It was also E. M. Price, as such secretary to said executors who, in her letter of November 13, 1947 [Ex. D-3, Tr. 2937], sent a copy of the indenture of trust to Mr. Hellis as secretary of The Irvine Company, and in said letter stated that the filing of said copy of said indenture of trust consists of said indenture of trust with The Irvine Company *completed this transaction,* which transaction meant the

vesting of the title of the Irvine Company stock for the first time in The James Irvine Foundation, as trustee, as provided in paragraph 3 of the indenture of trust which expressly stated that such title did not vest until after the death of James Irvine [Ex. A-1, Tr. 3674].

Furthermore, the burden was on the defendant The James Irvine Foundation to establish not only by the substantial evidence, but further by the unequivocal and clear convincing evidence that said indenture of trust was effectively delivered by Mr. Irvine to the Irvine Foundation, as trustee, immediately upon the signing thereof.

See the following authorities:

Lawson v. Lowengart, 251 A.C.A. 98; 59 Cal. Rptr. 186;

Estate of Albert, 38 Cal. App. 2d 46; 100 P. 2d 538;

Monell v. College of Physicians & Surg., 198 Cal. App. 2d 38; 17 Cal. Rptr. 744;

Blonde v. Estate of Jenkins, 130 Cal. App. 2d 682; 281 P. 2d 214;

Sullivan v. Shea, 32 Cal. App. 369; 162 Pac. 925;

Donegan v. Hibernia S & L Soc., 127 Cal. 137; 50 Pac. 389;

Humble v. Gay, 168 Cal. 516; 143 Pac. 778;

Atlantic Nat. Bk of Jacksonville, Fla. v. St. Louis Union Trust Co., 211 S.W. Rptr. 2d 6;

Bogert—Trusts, 2d Ed., Sec. 49, p. 391.

7. The finding of fact of the District Court that the indenture of trust was not found in the safe deposit boxes of James Irvine following his death, is clearly erroneous [R. 167].

8. The finding of fact of the District Court that there is lacking any evidence showing possession of the indenture of trust by James Irvine following its execution, is clearly erroneous [R. 167].

9. The finding of fact of the District Court that the only possession of the indenture of trust following its execution, as shown by the evidence was the possession of the Foundation shortly following the death of James Irvine, is clearly erroneous [R. 167].

Argument.

The findings of fact of the District Court 7, 8 and 9, are not supported by the substantial evidence. The evidence referred to by the District Court in its finding 6, concerning the indenture of trust not having been found in the safe deposit boxes of James Irvine following his death does not include the only evidence in the case concerning the possession of said indenture of trust, to wit: The evidence that the stock was to be placed with E. M. Price, who was to act as depositary, and was to be held by her in the safe in James Irvine's office [Ex. A-16, Tr. 3679], and that E. M. Price had said Irvine indenture of trust at the first meeting of the directors of the Irvine Foundation held on September 19, 1947, almost immediately after the death of James Irvine on August 24, 1947, and according to the minutes of said meeting E. M. Price read the Irvine indenture of trust for the first time to the directors present [Ex. A-14, Tr. 3678]. Said directors meeting was held where it always had been held—in the private office of James Irvine at 820 Crocker Building—the same office in which Mr. Irvine kept his safe. This safe is where said indenture of trust, together with the Irvine Company certificates of stock, were kept by E. M. Price as the confidential secretary and agent of Mr. Irvine during his en-

tire lifetime subsequent to February 24, 1937. There is no other substantial evidence in the case. The above cited authorities also hold that where the possession of the indenture of trust is shown to be in the hands of the trustee for the first time subsequent to the death of the trustor, it makes said alleged possession by the trustee during the lifetime of the trustor highly suspicious and requires that the trustee show by clear and convincing evidence that it did have the possession of said document during the lifetime of the trustor and that the same was delivered to the trustee immediately following the signing thereof and with the intent by the trustor that the title vested immediately.

Lawson v. Lowengart, 251 A.C.A. 98; 59 Cal. Rptr. 186.

10. The finding of fact of the District Court that the evidence preponderates in favor of a finding that the indenture of trust following its execution was delivered to the Foundation by James Irvine and that the indenture of trust was thereafter retained by it is clearly erroneous [R. 168].

Argument.

This finding of fact not only is unsupported by the substantial evidence in the case, but there is no evidence whatever to support said finding.

11. The finding of fact of the District Court that the plaintiff has failed to establish the non-delivery of the certificates for 510 shares of Irvine Company stock by James Irvine to The James Irvine Foundation, as trustee, is clearly erroneous [R. 168].

Argument.

This finding of fact constitutes an improper assignment of this burden to the plaintiff. The James Irvine

Foundation, as trustee, was required to establish by unequivocal, clear and convincing evidence that said indenture of trust and the certificates of Irvine Company stock had been delivered *in praesenti* by James Irvine to the Irvine Foundation, as trustee, and that it was the intention of James Irvine that the title to the Irvine Company stock would vest immediately.

12. The finding of fact of the District Court that the evidence preponderates in favor of a finding that "following the execution of the indenture of trust dated February 24, 1937, and the letter of James Irvine dated June 20, 1946, James Irvine endorsed in blank the certificates described in those instruments and delivered them to the Foundation, and thereafter during the lifetime of James Irvine the Foundation had in its possession certificates for 510 shares of Irvine Company stock or those issued in lieu thereof, endorsed in blank, is clearly erroneous [R. 168].

Argument.

This finding is not supported by the substantial evidence in the case. Insofar as the endorsements in blank of Certificates Nos. 28, 33 and 42 for the original 505 shares of Irvine Company stock that are described in the indenture of trust, the testimony of David A. Black, the handwriting expert, was the only evidence in the case concerning the endorsements by James Irvine on said certificates. Mr. Black testified that certificate No. 28 was endorsed by James Irvine on August 24, 1908, that certificate No. 33 was endorsed on April 17, 1923, and that certificate No. 42 was endorsed after May 29, 1924, and before June 1938 [Tr. 2573-2578, incl.]. Mr. Black was not cross-examined by any of the attorneys for the defendants and his testimony stands in the record uncontradicted.

13. The finding of fact of the District Court that "In paragraph 3 of the indenture of trust it is provided that the income of the trust 'shall be used, applied and devoted by the Trustee exclusively to or for the advancement of any charitable use or purpose in the State of California," is clearly erroneous. [R. 170].

Argument.

This finding misquotes the provision of the indenture of trust, which is as follows:

> "The *balance* of said income, after the deductions *and investments* hereinabove provided, shall be used, applied and devoted by the trustee exclusively for the advancement of any charitable use or purpose in the State of California,"

and so forth. It is therefore obvious that the balance only of the income that is left over after the income received by the trustee has been or may be invested by the trustee each year in perpetuity, and in such sums, including the whole or any portion of said balances, as the trustee shall in its sole and uncontrolled discretion deem wise and expedient for investment, and which investments shall become a part of the corpus or principal of the trust property and thereupon be frozen in perpetuity from devotion to any charitable purposes or uses. This investment provision in paragraph 2 of the indenture of trust permits the private and non-charitable use of all or some portion of the trust fund income and renders the entire trust void as being in violation of Article XX, Section 9 of the California Constitution, as a perpetuity and in violation of the restraints on alienation as provided in California Civil Code, Sections 715, 717, 749, and 771.

See the following California authorities:

In re Sutro's Estate, 155 Cal. 727; 102 Pac. 920;

In re Kline's Estate, 138 Cal. App. 514; 32 P. 2d 677;

In re Vance's Estate, 118 Cal. App. 163; 4 P. 2d 977;

In re Peabody's Estate, 21 Cal. App. 2d 690; 70 P. 2d 294;

See also the following authorities:

Grigson v. Harding, 114 A. 2d 870;

Goetz v. Old National Bank of Martinsburg, 84 S.E. 2d 759.

14. The finding of fact of the District Court that the direction in the indenture of trust as to the exclusion of assistance to tax supported charities does not have the effect of denying the trust the status of a trust for charitable uses and purposes, is clearly erroneous [R. 171].

Argument.

This finding of the District Court which impliedly holds that the trustee may arbitrarily and in its sole discretion exclude assistance to tax supported charities as provided in the indenture of trust does not effect the validity of the trust for charitable uses and purposes, clearly misapplies the law that is applicable to charitable trusts, which is that public objectives and uses and purposes are fundamental to the validity of a charitable trust. This mandatory provision in the indenture of trust precludes the devotion of any of the trust income to any of the public schools and other public institutions in the State of California which are maintained by taxes paid by the citizens of California for their support. This is clearly a non-charitable provision.

15. The finding of fact of the District Court that it is the theory of the plaintiff that under paragraph 2 of the indenture of trust the Board of Directors of the Foundation, as trustee, may in their uncontrolled discretion continually invest all of the income from the corpus of the trust and hence freeze all such income into the corpus of the trust and hence negate the use of income for charitable uses and purposes, is clearly erroneous [R. 171].

Argument.

It is not the theory of the plaintiff that under paragraph 2 of the indenture of trust that the Board of Directors of the Foundation, as trustee, may in their uncontrolled discretion continually invest the entire income from the corpus of the trust and hence negate the use of the entire trust income for charitable uses and purposes. It is the theory of the plaintiff that paragraph 2 of the indenture of trust "compels" the trustee to use all or any part of the balance of the trust income after the deductions enumerated in paragraph 1, for investment purposes which are private and non-charitable that renders the trust illegal and void as such provision violates the law of perpetuities and the statutes against restraints on alienation of property. It is quite obvious therefore that the entire trust is bad and fails because it is illegal and void by reason of the power vested in the trustee for the non-charitable use of all or part of the income received from dividends on the Irvine stock which is the trust *res,* for investments, which thereupon *ipso facto* become part of the principal or corpus of the trust estate which can never be distributed for charitable purposes, as the trust is solely an income trust.

16. The finding of fact of the District Court that where a trust is established with a charitable corporation as trustee, the provisions in its articles of incorporation

may be applied along with the provisions of the trust instrument to limit the trust to solely charitable purposes, is clearly erroneous.

Argument.

This finding of fact of the District Court is not supported by the case of *Brown v. Memorial National Home Foundation* as cited in support of said finding and said finding is not supported in any other case that has ever been decided in any jurisdiction that is known to appellant. It is basic trust law that an indenture of trust must be interpreted and applied the same as a will that contains trust provisions and in accordance with the provisions thereof, and that the trustee is bound by and must adhere to the directions of the trustor that are set forth in the indenture of trust. No indenture of trust was involved in the above case that was cited by the District Court to support said finding. The Memorial National Home Foundation was organized as a charitable corporation, and therefore its powers and objects and purposes were contained *solely* in its articles of incorporation. In the case of *Davenport v. Davenport Foundation,* 36 Cal. 2d 67; 222 P. 2d 11, where a charitable corporation was trustee under a separate indenture of trust executed by the trustor Davenport, the Supreme Court of California held that the non-charitable provisions contained in the indenture of trust rendered the trust void. Insofar as the interpretation of the Irvine indenture of trust is concerned in this appeal the *Davenport* decision by the Supreme Court is applicable and not the decision of the District Court of Appeal in the *Brown* Case.

17. The finding of fact of the District Court that the incorporation of the Foundation and the execution of the indenture of trust with the Foundation as trustee are closely related, is clearly erroneous [R. 172].

Argument.

This finding is a continuation of the mistake the District Court made with reference to finding 16 [R. 172] where said court stated that the articles of incorporation of the Irvine Foundation may be applied along with the provisions of the Irvine indenture of trust to limit the trust to solely charitable purposes and thereby circumvent the investment mandate that is contained in paragraph 2 of the Irvine indenture of trust. There is no evidence whatever to support this finding, and as a matter of law there is no relationship between the indenture of trust and the articles of incorporation of the Foundation except that under the articles of incorporation the Irvine Foundation is authorized to act as a qualified trustee under an indenture of trust, but insofar as its powers and duties are concerned as such trustee it is bound by the provisions of the indenture of trust and not by the articles of incorporation.

The James Irvine Foundation, a corporation, stands in a fiduciary relationship only under the indenture of trust and at the most, holds the legal title in trust to the Irvine stock subject to the directions contained in the indenture of trust. It has no beneficial interest or title in or to the Irvine stock.

18. The finding of fact of the District Court that the purpose and objective that is stated in the articles of incorporation of the Foundation is to assist California charities, is clearly erroneous [R. 172].

Argument.

This finding of fact of the District Court is wholly extraneous as to any of the issues involved in this case. We are not concerned in any respect with the Irvine Foundation with the one exception that said corporation under its Articles of Incorporation has the legal authority to act as trustee under the indenture of

trust the same as any other corporation in California that is authorized to act as a trustee.

19. The finding of fact of the District Court that the manifest objective of James Irvine in incorporating the Foundation and in executing the indenture of trust was to make it possible for a substantial part of his property to be devoted to the assistance of California charities, is clearly erroneous [R. 172].

Argument.

This finding of the District Court is not only unsupported by the substantial evidence but is contrary thereto. The intent of James Irvine in creating the private and noncharitable trust that is described in paragraph 2 of the indenture of trust is clearly established in unambiguous and certain language, and from the interpretation of said indenture of trust, from the four corners thereof, there can be no doubt that James Irvine intended that the trustee, to wit, the Irvine Foundation, as trustee, under the direction contained in said paragraph 2 would be compelled to build up the corpus or principal of the trust estate by investing so much of the balance of the income, including the whole thereof in perpetuity and where it would never be available for devotion to any charitable uses or purposes. We are dealing with an income trust, and the only trust fund that is available for the private and noncharitable purpose and the charitable purpose provided in the indenture of trust is the income received from the dividends from the Irvine Company stock. The principal or corpus of the trust can never be distributed for charitable purposes or for private purposes, and inasmuch as the trust is in perpetuity the corpus or principal will never be distributed for any purpose, either private or charitable, but will be held forever, and this private income investment provision therefore renders the entire trust illegal and void.

20. The implied finding of fact of the District Court that under Sections 12580-12595, incl., California Government Code, the Attorney General of California, by court action can prevent the trustee, to wit, The James Irvine Foundation, as trustee, from departing from the objects and purposes of the indenture of trust, including the elimination of the mandatory noncharitable direction of the trustor that is contained in paragraph 2 of the indenture of trust which requires The James Irvine Foundation, as trustee:

> "Out of the balance of said income, after the deductions hereinabove provided, (the payment of administration expenses and replacement of losses), the Trustee may and in the judgment of the trustor should, each year set aside such sum as the Board of Directors of the trustee shall in its sound discretion deem wise and expedient for investment, and said trustee shall invest the same in accordance with subparagraph 3 of the powers hereinafter enumerated, which said investments, when made, shall become a part of the corpus or principal of the trust property, and the income and profits therefrom shall thereafter be used, applied and devoted as in this trust provided",

is clearly erroneous as a matter of law [R. 173].

Argument.

This finding implies that the Attorney General of California can enforce a void trust and of course neither the Attorney General or anybody else has any power under the law to do so; neither can the courts of California through action by the Attorney General convert the void Irvine trust into a valid charitable trust. The Supreme Court of California has already ruled in the following cases against the statement that is contained in the finding of fact of the District Court which implies that the Attorney General of California by court action may eliminate the investment direction contained

in paragraph 2 of the indenture of trust and thereby prevent the trustee from being bound by the illegal private investment purposes contained in paragraph 2 of the trust, to wit:

See the following authorities:

In re Sutro's Estate, 155 Cal. 727; 192 Pac. 920;

In re Kline's Estate, 138 Cal. App. 514; 32 P. 2d 677;

In re Vance's Estate, 118 Cal. App. 163; 4 P. 2d 977;

In re Peabody's Estate, 21 Cal. App. 2d 690; 70 P. 2d 249.

21. The finding of fact of the District Court that the Attorney General's construction of the trust would result in the trust being preserved for the purpose of assisting California charities and that it is the view of the District Court that the Attorney General's construction is the more natural and reasonable construction, is clearly erroneous as a matter of law [R. 174].

Argument.

This finding implies that the erroneous construction as a matter of law that the Attorney General in his post trial brief placed upon the private non-charitable and illegal investment provision contained in paragraph 2 of the indenture of trust would result in the trust being preserved for the purpose of assisting California charities is unsupported by the substantial evidence and the law in California as established under the California cases above cited. The expressed view of the District Court which is the basis for said finding that it was the view of said District Court that the Attorney General's construction of said paragraph 2 as stated in his said brief, is the more natural and reasonable construction, does not constitute a legal basis to support

said finding as the Attorney General of California is neither by his erroneous construction of said paragraph 2 or by any other action vested with any power or authority whatever to put any vitality or legality into a void charitable trust or to enforce said void charitable trust.

22. The finding of fact of the District Court that the trust involved in the plaintiff's action is a valid trust for charitable uses and purposes under the California law exempting such trusts from the rule against perpetuities, is clearly erroneous [R. 174].

Argument.

This finding is unsupported by the substantial evidence and the law as established by the California Supreme Court in the cases above mentioned.

23. The implied finding of fact of the District Court that under the indenture of trust The James Irvine Foundation would and did become the owner of the majority of the shares of the stock of The Irvine Company during the lifetime of James Irvine, is clearly erroneous [R. 174].

Argument.

This finding is not supported by the substantial evidence and the provisions of the indenture of trust disclosed that it was the intention of James Irvine that the Irvine Foundation, as trustee, would not become vested with the title to the Irvine Company stock or have vested in it as trustee any powers, rights or privileges until after the death of James Irvine which did not occur until August 24, 1947.

24. The implied finding of fact of the District Court that The James Irvine Foundation as the owner of the majority of the shares of the stock of The Irvine Company, carried with it control of that company including

its dividend policies during the lifetime of James Irvine, is clearly erroneous [R. 174].

Argument.

This finding is unsupported by the substantial evidence in the case. To the contrary, the substantial evidence established that the Irvine Foundation, was trustee of an illusory trust and was not intended by James Irvine to have and did not have any rights, powers, privileges, title or interest in or to The Irvine Company stock, as trustee, until after the death of James Irvine, and the evidence is undisputed that the Irvine Foundation, as trustee, at no time during the lifetime of Mr. Irvine asserted any dominion or control whatever over the 510 shares of Irvine stock or The Irvine Company and/or the dividend policies of The Irvine Company, during the lifetime of James Irvine. Said substantial evidence further established that said Irvine Foundation, as trustee, had no beneficial ownership interest or connection whatever during the lifetime of Mr. Irvine with any of the corporate affairs or business of The Irvine Company.

The documentary evidence in the case conclusively established that during the 10 year period following the execution of said indenture of trust on February 24, 1937, and until the death of James Irvine on August 24, 1947, The Irvine Company was a complete stranger to the Irvine Foundation, as trustee, and that during all of said 10 year period James Irvine was the absolute owner of the 510 shares of Irvine Company stock and continued at all times during said 10 year period to exercise the dominion and control over The Irvine Company, as the owner of said 510 shares of Irvine stock which he had owned and held since 1894, when The Irvine Company was incorporated, and which he continued to own and hold until he died on August 24,

1947, whereupon said 510 shares of Irvine stock became an asset in the Estate of James Irvine, Deceased, and belonged subject to the administration of said estate of James Irvine, Deceased, to the heirs at law of James Irvine. The appellant again calls the attention of the Court to the voluntary declaration of James Irvine that is contained in all of the balance sheets which are attached to each of the income tax returns of The Irvine Company during the period 1936 to 1947 which states as follows:

"Ownership of company stock

"James Irvine owns 547 shares out of a total of 1,000 shares outstanding. This stock was acquired in 1894 and his return is filed in San Francisco where he resides."

The 547 shares of stock referred to in said balance sheets included the 510 shares of Irvine stock covered by the indenture of trust [R. 164].

25. The finding of fact of the District Court that the indenture of trust is not illegal as being contrary to public policy, is clearly erroneous [R. 175].

Argument.

This finding of the District Court is contrary to the substantial evidence and the established law in California because of the inclusion in said indenture of trust of the non-charitable and private investment purposes that are contained in paragraph 2 which authorizes and compels the trustee to divert all or part of the trust income to private and non-charitable uses, objectives and purposes, to wit: Private investments which *ipso facto* thereupon become a part of the principal or corpus of the trust estate and are thereafter frozen in perpetuity from ever being available for distribution for charitable purposes.

26. The finding of fact of the District Court that the transfer of The Irvine Company stock was not testamentary in character, is clearly erroneous [R. 175, 176].

Argument.

In support of this finding, the District Court cites the case of *Nichols v. Emery,* 109 Cal. 323, 41 Pac. 1089, and states that this authority is a landmark case which has been followed by the California Appellate Courts. This case has no application whatever to the substantial evidence that is disclosed by the record in the Irvine case. The Supreme Court in *Nichols v. Emery* only ruled that the substantial evidence in that case disclosed that the grantor-trustor intended to pass title to the grantee-trustee *in praesenti.* The finding made by the District Court merely states that the delivery of the stock was *in praesenti* but the intention of Mr. Irvine in connection therewith is not mentioned. The issue involved in the case of *Nichols v. Emery* was whether or not the grantor-trustor intended that title passed *in praesenti.* The finding of the trial court was that the grantor-trustor did not intend to pass title *in praesenti.* However, the Supreme Court held that the substantial evidence in the case disclosed that it was the intention of the grantor-trustor topass title in *praesenti.* The Supreme Court in *Nichols v. Emery* also made a further finding, to wit, that the trust in that case was operative and absolute during the lifetime of grantor-trustor. The difference between the substantial evidence in the appellant's case and in *Nichols v. Emery* is that the Irvine indenture of trust was not operative or absolute until after the death of James Irvine. The grant deed in *Nichols v. Emery* provided that the grantee-trustee received the rents, issues and profits from the real property that was the corpus of the trust during the lifetime of the grantor-

trustor. This provision in said deed vested title in the trustee to the income, rents, issues and profits from the trust corpus and therefore an interest was transferred *in praesenti* in the trust property to the trustee during the lifetime of the trustor. There was also evidence in *Nichols v. Emery* that the grantee-trustee owned part of the crops as well as part of the profits from the corpus during the lifetime of the grantor-trustor. The record in *Nichols v. Emery* further disclosed that the attorney for the grantor-trustor made an affidavit in connection with a motion for a new trial that his client, the grantor-trustor at the time of the execution of said grant deed clearly understood that the deed vested and was intended to vest the whole title immediately to the land therein described in the grantee and trustee, and that there was no understanding between the grantor-trustor and the grantee-trustee that the grantor-trustor should remain in possession of the land described in the deed during his lifetime or at anytime at all or that he should enjoy the rents, profits, or products of said land. Furthermore, the deed in *Nichols v. Emery* was recorded immediately by the grantee-trustee whereas the Irvine Company stock certificates were never transferred on the books of The Irvine Company or by the issuance of new certificates into the name of the Irvine Foundation until approximately three months after the death of James Irvine, and while this fact is not controlling nevertheless it is a circumstance to be considered in connection with the absence of any acts on the part of the Irvine Foundation, as trustee, concerning its alleged ownership of the Irvine stock during the lifetime of James Irvine.

27. The finding of fact of the District Court that the consent of the California Inheritance Tax Department was given to the transfer to the Foundation of the 510 shares of Irvine Company stock on the stock

records of The Irvine Company, is clearly erroneous [R. 179].

Argument.

There is no evidence of any kind in the case to support this finding. The consent of the Controller of California did not mention The James Irvine Foundation [Ex. B-7, Tr. 2081]. Neither did said consent nor the consent of the Tax Commissioner of the State of West Virginia authorize the executors of the Estate of James Irvine to transfer any of the assets of said estate to a stranger to said estate which was the legal status of the Irvine Foundation, without consideration and in the absence of an order or judgment of the Superior Court of the State of California for the City and County of San Francisco in an adversary action by the Irvine Foundation against the Estate of James Irvine, Deceased.

28. The finding of fact of the District Court that James Irvine reserved no power to designate the successors in office to the members of the first Board of Directors or to remove any Director from office, is clearly erroneous [R. 181].

Argument.

The only vacancy on the board of directors or of the membership during the lifetime of James Irvine subsequent to 1937, was caused by the death of Mr. Irvine's attorney W. H. Spaulding, and was filled by Robert H. Gerdes, Mr. Irvine's attorney, who was personally selected by James Irvine to fill said vacancy [Tr. 1810].

29. The finding of fact of the District Court that Mr. O'Connor testified at the trial that he was of the view that the agency theory suggested by him in a letter dated August 6, 1949, was not well founded, is clearly erroneous [R. 180].

Argument.

This finding is contrary to the testimony of Mr. O'Connor which is set forth in the appendix to appellant's brief.

30. The finding of fact of the District Court that R. C. O'Connor in a letter signed by him, dated August 6, 1949, made a statement that the trustor (James Irvine) had "complete dominion over the trustee" lacked evidentiary support, is clearly erroneous [R. 180].

Argument.

This finding is not supported by the substantial evidence in the case which to the contrary overwhelmingly established that James Irvine had the absolute control and dominion of The James Irvine Foundation during his entire lifetime, the same as he had over his other *alter ego* The Irvine Company. Insofar as the Irvine Foundation is concerned, Mr. Irvine placed his agents, attorneys, employees and tax advisers as members and directors of said corporation, and placed his son Myford Irvine as his "dummy" president, and placed his confidential secretary E. M. Price as his "dummy" secretary-treasurer of said corporation. Both of said "dummy" officers were at all times subject to the orders and directions of their principal and employer James Irvine.

31. The finding of fact of the District Court that it seems clear that James Irvine did not have dominion over the control of The James Irvine Foundation, as trustee, under the indenture of trust is clearly erroneous [R. 181].

Argument.

This finding to the effect that James Irvine did not have the dominion and control over the Irvine Foundation is not supported by the substantial evidence.

During the 10-year period following the execution of the indenture of trust on February 24, 1937 and

until August 24, 1947, when James Irvine died, the directors and members of the Irvine Foundation, as trustee, performed no duties whatever and had no powers in connection with the post mortem operative provisions of the indenture of trust. The very minor and illusory chores carried on by them for the Irvine Foundation corporation as the attorneys, agents and employees of James Irvine were confined to passing resolutions that accepted with thanks outright cash donations from Mr. Irvine. James Irvine merely transferred his money to his other pocket. Insofar as Myford Irvine as president, and E. M. Price as secretary-treasurer of said corporation during said 10-year period are concerned, each of said individuals owed their complete allegiance to James Irvine and their employer and whatever orders and/or directions he gave to them as his "dummy" officers of the Irvine Foundation corporation would have been carried out implicitly by each of them.

32. The finding of fact of the District Court that James Irvine at any time could have alienated all of the assets of The Irvine Company would not be of determinative legal significance as to his control over the corpus of the trust and the Foundation, as trustee during his lifetime, is clearly erroneous [R. 181, 182].

Argument.

This finding is not supported by the substantial evidence. James Irvine could have alienated all of the assets of The Irvine Company at any time after the incorporation thereof in 1894 because he, solely, as the owner or in absolute control through trust agreements and proxies of all of the stock of said Irvine Company during his lifetime could have disposed of the entire assets of The Irvine Company without consulting with anybody. For all practical purposes Mr. Irvine was the only stockholder in The Irvine Company during his entire lifetime and as said sole stockholder he could have sold

all of the assets of The Irvine Company on his own signature. The acts and declarations of James Irvine as well as the provisions of the indenture of trust clearly established that Mr. Irvine never intended that title to the Irvine Company stock would pass to The James Irvine Foundation, as trustee, until after his death.

33. The finding of fact of the District Court that the control retained by the trustor, as described in the case of *Dessar v. Bank of America N.T.S.A.,* 353 F. 2d 468, was as great, if not greater than the control retained by James Irvine, as trustor, is clearly erroneous [R. 182].

Argument.

This finding is not supported by the substantial evidence or by the case quoted by the District Court. In the first place, in the *Dessar* case the indenture of trust provided in the first paragraph thereof as follows:

> "The Trustor has assigned, transferred and delivered, and by these presents does assign, transfer and deliver to the Trustee the personal property described in Schedule 'A' attached hereto and made a part hereof, and which is declared by the Trustor to be her separate property and estate. The Trustee hereby acknowledges receipt of said property which, with any additions that may hereafter be made thereto, is intended to constitute and is hereinafter referred to as the 'trust estate'."

The Irvine indenture of trust contains no provision to the effect that the Irvine Company stock had been delivered to the trustee nor does the Irvine Foundation, as trustee, acknowledge in said indenture of trust over its signature that it has received the Irvine Company stock. Furthermore, in the *Dessar* case the evidence disclosed that the securities that constituted the trust estate

were actually transferred into the name of the trustee bank and that said trustee bank received the dividends on said securities and that said dividend income was paid by the bank to the trustor. It therefore conclusively appeared in the trust instrument that was involved in the *Dessar* case and from the evidence in said case that the trust involved therein was both operative and absolute during the lifetime of the trustor. In the said *Dessar* trust instrument, which is set forth in the decision of the Court, the said trustee was vested with the full powers and duties of an active trustee that was managing a trust that was both operative and absolute immediately upon the execution of the indenture of trust. The trust instrument in the *Dessar* case provided that the trustor reserved the right during her lifetime to make further amendments to the indenture of trust and to revoke the same and the right to give directions to the trustee with reference to certain investments but the trust instrument provided in this respect that if said right was not exercised by the trustor upon notice to the trustee the same was not effective. As stated by the court in the *Dessar* case it was obvious from the operative and absolute *inter vivos* provisions of the trust instrument as taken from the four corners thereof that the same was a valid trust. There is no comparison whatever between the trust instrument and the evidence in the *Dessar* case and the indenture of trust and the evidence with which we are concerned in the plaintiff's case against The James Irvine Foundation, as trustee.

James Irvine had been a party to several trust instruments prior to the 1937 indenture of trust and he knew the difference between an absolute and operative trust and an illusory trust. In 1931 Mr. Irvine entered into an indenture of trust with the Anglo-California Trust Company, of San Francisco [Ex. B-15 (Ex. B1 attached thereto), Tr. 2084], which trust indenture

provided that upon his marriage to Katharine Brown White she would be the beneficiary of said trust. Mr. Spaulding was also Mr. Irvine's attorney in 1931 and in his 1931 indenture of trust the first paragraph is quite similar to the conveyance paragraph that is contained in the Dessar trust instrument, and reads as follows:

> "Now, therefore, the said trustor has conveyed, assigned and transferred and delivered, and does hereby convey, assign, transfer and deliver to said trustee in trust nevertheless as herein set forth the following property (stocks and bonds described).
>
> "It is agreed that the said trustee has taken and received said property, and does hereby take and receive the same, to hold for the following uses and purposes and not otherwise."

When the conveyance paragraph in the *Dessar* case and the conveyance paragraph in Mr. Irvine's 1931 trust for his wife are compared with the first conveyance paragraph in the 1937 indenture of trust the substantial difference between these conveyance clauses discloses the intention of Mr. Irvine in the 1937 indenture of trust to create a testamentary trust. The said conveyance clause in the 1937 indenture of trust reads as follows:

> "The trustor hereby transfers, and assigns and conveys to the trustee, to have and to hold in trust, nevertheless, and for the following trust uses and purposes, the following securities, to wit:"

Absent from the 1937 indenture of trust is the provisions in the *Dessar* trust instrument that

> "the trustee hereby acknowledges receipt of said property which, with any additions that may hereafter be made thereto, is intended to constitute and is hereinafter referred to as the trust estate".

In the 1931 Irvine indenture of trust, as well as in the *Dessar* trust instrument the word "delivery" is set forth, and in each of said trust instruments the trustee acknowledges the receipt of the bonds and stocks that are described as the corpus of each respective trust estate. This is the usual provision that is contained in a true *inter vivos* trust instrument. In the 1931 trust James Irvine specifically assigned Certificate No. 33 for 40 shares of the stock of The Irvine Company to "for transfer to Katharine Brown Irvine" and by endorsement on said certificate the trustee acknowledged that said certificate had been delivered to the trustee. There is no such proof by any documentary evidence of actual delivery of the Irvine Company stock to the Irvine Foundation, as trustee, and the absence of the provision that was in the Irvine 1931 trust instrument clearly denotes the intention of Mr. Irvine not to pass title *in praesenti* to the Irvine Foundation, as trustee.

Nothing whatever is stated in the 1937 indenture of trust with reference to the management and control of the trust property during the lifetime of Mr. Irvine by himself, as trustor, or by the trustee. The reason for the absence of any management or control provision being reserved by Mr. Irvine was that he never relinquished or surrendered his dominion and control over the ownership of the Irvine Company stock and the assets represented by said stock, to wit, the land holdings and other assets of The Irvine Company, so there was no reason for James Irvine, as trustor, to reserve any powers of management in the indenture of trust with reference to the administration of the trust or his dominion and control over the 505 shares of Irvine Company stock. James Irvine never relinquished or divested himself of any control over any of the stock issued by The Irvine Company from the date The Irvine

Company was incorporated in 1894 until the date of his death in 1947. In addition to his own stock, which included the 505 shares thereof that were described in the indenture of trust, James Irvine controlled the beneficial or legal ownership title in the remaining 495 shares outstanding, which included the 200 shares of plaintiff-appellant Athalie Irvine Smith, the 50 shares he held in trust for his granddaughter Kathryn Lillard, now Kathryn Lillard Wheeler, the 40 shares that were held by the Anglo-California Trust Company for the benefit of Mr. Irvine's wife, and the 200 shares that were held by his son Myford, but which James Irvine voted by proxy at every annual stockholders' meeting of the Irvine Company from February 24, 1937 to the date of his death on August 24, 1947.

Under paragraph 3 of the indenture of trust no powers or duties whatever, nor any right, title or interest in the Irvine Company stock is given to the trustee until after the death of James Irvine. In the paragraphs preceding said paragraph 3, James Irvine reserved the dividends on the Irvine Company stock and reserved the right to vote the Irvine Company Stock and reserved the power to revoke the trust and to amend or cancel any amendments thereto. These are all of the so-called reservations or powers that are enumerated in the indenture of trust during the lifetime of James Irvine.

The powers of the trustee which commence at the top of page 4 of the indenture of trust, state:

> ". . . after the death of the trustor all rents, interest dividends and other profits of the trust property shall be collected and received by the trustee and shall be used, applied and devoted as follows: . . ."

It is obvious that this power to receive the dividends of the Irvine Company stock was not to be operative

until after the death of the trustor, to wit, James Irvine. The powers that are contained in paragraphs 1, 2 and 3, pages 4 and 5 of the indenture of trust are expressly not operative until after the death of the trustor. The sub-paragraph under paragraph 3 makes the post mortem powers and duties of the trustee emphatically clear with the following language:

> "To carry out the express purpose of this trust and in aid of its execution and the proper administration, management and application of the trust property, the Trustee is vested, *after the death of the Trustor,* with the following additional powers and discretions:
>
> "1. To have, respecting the shares of stock hereinabove described (505 shares of Irvine Company stock) and all other securities which may be held in this trust, all the rights, powers and privileges of an owner, including the voting thereof and giving proxies therefor; . . ."

It is therefore undisputed that there were no powers of any kind or any title to the Irvine Company stock vested in the trustee until after the death of the trustor. The reference that "after the death of the Trustor" the trustee would be vested "with the following additional powers and discretions" refers back to the first paragraph on page 4, which is hereinabove set forth and which is applicable to paragraphs 1, 2 and 3, pages 4 and 5, of the indenture of trust, as to the powers stated therein and which are to *become operative only after the death of the trustor.*

This same testamentary intent of the trustor that is expressed in the indenture of trust is also expressed by James Irvine's other acts and declarations, not only before but after the execution of the indenture of trust, and constitutes the substantial evidence in the case;

and conclusively established that not only was the trustee without any powers or duties as said trustee during the lifetime of James Irvine but, furthermore, that it was the intention of James Irvine that no title to the Irvine Company stock would pass to or vest in the trustee until after his death. This conclusion is further fortified by the provision contained in paragraph 5 on page 7 of the indenture of trust, which states that in addition to the post mortem powers and discretions of the trustee that are enumerated in the foregoing provisions of said indenture of trust the trustee and the board of directors thereof, in addition thereto were further vested with and shall have *after the death of the trustor,* and for the full duration of said trust thereafter, as to the trust property, the income therefrom, and in the execution of said trust the same powers and discretions that an absolute owner has or may have, but subject to all of the post mortem provisions and conditions of said trust. An indenture of trust was never drawn that more completely and distinctly provided that the intention of the trustor, as expressed in the Irvine indenture of trust, was solely testamentary and created a mere agency.

34. The finding of fact of the District Court that the contention of the plaintiff that the relationship of the Foundation to the shares of stock here in question was that of a mere agent is not well founded, is clearly erroneous [R. 183].

Argument.

This finding that the relationship of the Foundation to the Irvine Company stock was not that of a mere agent is not supported by the substantial evidence. We already have commented on the agency relationship between James Irvine and his son Myford and his secretary E. M. Price, and this agency subject

matter will be further considered in another chapter of appellant's brief.

35. The finding of fact of the District Court that in the indenture of trust dated February 24, 1937 the statement by the trustor therein that he "hereby transfers, assigns and conveys to the trustee" the 505 shares of Irvine Company stock, and also the five shares of Irvine Company stock, makes it clear that under the California law the indenture upon its execution and delivery transferred to the Foundation a beneficial interest *in praesenti* in the shares of stock, subject only to being divested by the exercise by James Irvine of his power of revocation, is clearly erroneous [R. 183].

Argument.

This finding which states that the statement in the first paragraph of the indenture of trust, to wit, the trustor states that he "hereby transfers, assigns and conveys to the trustee' the 505 shares of stock", is not the full assignment clause which appears in said paragraph or in paragraphs 3 and 5, and which is as follows:

> "That the trustor hereby assigns and conveys to the trustee, to have and to hold in trust, nevertheless and for the following uses and purposes, the following securities, to-wit:

Certificate Number	Number of Shares
28	332
33	132
42	41"

The reference in the said first paragraph, *i.e.*, ". . . nevertheless and for the following trust uses and purposes," relates to the subsequent post mortem conveyance paragraphs in said indenture of trust hereinabove referred to, *i.e.*, the first unnumbered subparagraph under paragraph 3 on page 6, which limits and

restricts the vesting of the title to the Irving Company stock until after the death of James Irvine. This provision is not referred to at any time by the District Court in its Memorandum or in any of its findings of fact, but is completely disregarded and apparently had been overlooked. However, said sub-paragraph of paragraph 3, as well as paragraph 5 makes it emphatically clear that it was the intention of James Irvine, as trustor, that no title, rights, powers or privileges in or to the Irvine Company stock vested in The James Irvine Foundation, as trustee, until after his death, and furthermore that no powers, rights, privileges or duties vested in the Foundation, as trustee, until after the death of James Irvine. The trust described in the 1937 indenture of trust clearly was an attempted testamentary disposition and the trust was therefore illegal and void.

The further finding that it is clear that under the California law the indenture upon its execution and delivery transferred to the Foundation the beneficial interest *in praesenti* in the shares of Irvine Company stock is not supported by the substantial evidence which is, to the contrary, first, the indenture of trust itself, and second, the declarations and acts of James Irvine before and after the execution thereof, clearly show that no beneficial interest in the shares of Irvine Company stock ever vested in perpetuity or at all in the Irvine Foundation, as trustee, and that it was the expressed intention of James Irvine that the beneficial ownership of said Irvine Company stock and the title thereto was vested in himself during his entire lifetime.

The Irvine Foundation, as trustee, never at any time and in perpetuity could own or hold the beneficial interest in the Irvine Company stock for as trustee the most that it could ever hold would be the legal title

that was forever separated from any beneficial ownership interest or title.

36. The finding of fact of the District Court that James Irvine endorsed the certificates for the shares of Irvine Company stock in blank and delivered them to the Foundation, is clearly erroneous [R. 184].

Argument.

This finding implies that James Irvine endorsed the certificates of Irvine Company stock following or simultaneously with the execution of the indenture of trust and at the same time delivered said stock to the Foundation. This finding is not supported by the substantial evidence as hereinabove set forth.

37. The finding of fact of the District Court that the established California law which is applicable in this case is that the delivery of an endorsed certificate of stock is sufficient to effect a valid transfer of the shares of stock represented by the certificate, is clearly erroneous [R. 184].

Argument.

This implied finding is not a correct statement of the law in California that is applicable to the substantial evidence in this case. The basic California law that is applicable to the transfer in trust of a certificate of stock by a trustor to a trustee, is that in addition to the manual delivery to and the acceptance by the trustee, in order to constitute a valid conveyance to the trustee there must exist a mutual intention on the part of the parties, particularly on the part of the trustor, to pass title to the stock immediately. In other words, to be a valid delivery the indenture of trust must be meant by the trustor to be presently effective as an operative trust and an immediate vesting of the title, *i.e.*, there must be the intent on the part of the trustor to divest himself presently of the title. Even if the in-

denture of trust is manually delivered but the evidence shows that the parties or the trustor intended the document to become operative only upon the death of the trustor, the document is testamentary in character and is void as a conveyance.

Declarations and acts of the trustor before and after the alleged delivery are admissible in evidence on this issue of intent. A conveyance or transfer of personal property including shares of corporate stock, delivered with the intent that it shall take effect only upon the death of the trustor is an attempted testamentary disposition and is therefore void. This finding states and/or implies that where the word "delivery" is used in the authorities cited by the District Court it means only the manual transmittal of the Irvine Company shares of stock involved; this is not true in this case because the law in California is that where the delivery that the California authorities are talking about, and the delivery with which we are concerned in this case means delivery with the intent by the trustor to vest immediately in the trustee title to the Irvine Company stock described in the indenture of trust. Furthermore, the retention of the possession of the trust property by the trustor or his agent and the exercise of acts of proprietorship over it by the trustor are evidence of ownership and a lack of delivery. Exercise of dominion over the trust *res* after the execution of the indenture of trust by the trustor James Irvine or his agents E. M. Price or Myford Irvine under the circumstances in this case, where the trustor's son and employee was the "dummy" president of the trustor's *alter ego* The James Irvine Foundation corporation, and his confidential secretary E. M. Price was the "dummy" secretary-treasurer of said *alter ego* corporation and who also was the custodian and depositary of the trust *res,* to wit, the Irvine Company stock, the dominion and control by James Irvine, as the trus-

tor, is not based on surmise or conjecture. The best evidence and the substantial evidence in the case is that James Irvine controlled The Irvine Foundation corporation and the officers thereof as his employees and agents, and there was not a scintilla of evidence in the record of any real independent interest or connection whatever between The Irvine Company and The James Irvine Foundation during the entire lifetime of James Irvine. Had the 1937 indenture of trust created a valid *inter vivos* trust, and had the trustee held the legal title to the 510 shares of Irvine stock that was worth 50 million dollars at least, the trustee would have had some powers and some duties to perform in connection with the operation of a trust; as hereinabove mentioned, Myford Irvine, as president of the Irvine Foundation from 1937 to 1947 (which period represented the lifetime of James Irvine following the execution of the indenture of trust) would have attended at least one annual shareholders meeting of The Irvine Company but, as the minutes of the said Irvine Company disclose, he never went to a single meeting of the shareholders of The Irvine Company during said 10-year period, and he attended but two directors meetings during the same period. The fact that the trust was revocable did not change the right of the trustee to control the dominion over the Irvine Company stock and The Irvine Company if it was the intention of the trustor that title to the Irvine Company stock would vest immediately in the Irvine Foundation upon the execution of the indenture of trust on February 24, 1937. The minutes of the meetings of the members and directors of The James Irvine Foundation during said 10-year period [Ex. A-14, Tr. 3678], as well as its income tax returns during said 10-year period [Ex. 21, Tr. 2814] negate any contentions by the defendant Foundation that it exercised any dominion whatever as a real

independent trustee over the Irvine Company stock during the lifetime of James Irvine, and this evidentiary conclusion is made absolute by the minutes of the meetings of the shareholders and directors of The Irvine Company [Ex. 2, Tr. 3647], and the income tax returns of The Irvine Company [Ex. 3, Tr. 3647], which also during said 10-year period negate any contentions by the defendant Foundation that it exercised any dominion whatever as trustee over the Irvine Company stock during the lifetime of James Irvine. Upon consideration of the entire record and the cumulative effect of the substantial evidence, the inescapable conclusion that must be drawn therefrom is that James Irvine never intended that title to the Irvine Company stock would vest in the Irvine Foundation, as trustee, or that the trust would be operative or absolute during his lifetime. Furthermore, this finding of the District Court is not supported by the only evidence in the case concerning the time when James Irvine endorsed said certificates of Irvine Company stock, which is the testimony of David A. Black, the handwriting expert [Tr. 2573], which has already been commented upon hereinbefore and will not again be referred to.

38. The implied finding of the District Court that the established California law which is applicable in this case that the delivery of an endorsed certificate of stock is sufficient to effect a valid transfer of the shares of stock represented by the certificate, is clearly erroneous [R. 184].

Argument.

This implied finding is an incorrect statement of the law, as pointed out hereinabove in connection with finding 35 [R 183].

39. The finding of fact of the District Court that it seems clear that under the California law the endorsement by James Irvine of the certificates for the shares of stock and the delivery by him of those certificates to the Foundation transferred a beneficial interest *in praesenti* in those shares of stock to it subject only to being divested by the exercise by James Irvine of his power of revocation, is clearly erroneous [R. 185].

Argument.

This finding is not a correct statement of the law under the substantial evidence in this case, because said finding excludes the intention of Mr. Irvine not to vest the title to said Irvine Company stock immediately in said trustee or during his lifetime. Furthermore, only the legal title is vested in a trustee. The beneficial title is vested in the *cestui que trust.*

40. The finding of fact of the District Court that it is the view of said court that none of the contentions of the plaintiff are well founded, is clearly erroneous [R. 185].

41. The finding of fact of the District Court that on the merits the plaintiff is not entitled to the relief sought by her in her amended complaint, is clearly erroneous [R. 185].

Argument.

These two findings 40 and 41 are not supported by the substantial evidence.

ARGUMENT.

The Trust Set Forth in the Indenture of Trust Is Prohibited by the California Constitution, Article XX, Section 9, and Violates California Civil Code, Sections 715, 716, 749, and 771, and Therefore Fails Because of Illegality.

The provision of the California Constitution and the sections of the California Civil Code which were violated by the Indenture of Trust are as follows:

"No perpetuities shall be allowed except for eleemosynary purposes."

Constitution, Article XX, Sec. 9.

"Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation can not be suspended, by any limitation or condition whatever, for a longer period than as follows:

"1. During the continuance of the lives of persons in being at the creation of the limitation or condition; or

"2. For a period not to exceed twenty-five years from the time of the creation of the suspension."

Civ. Code, Section 715.

"Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

Civ. Code, Section 716.

"The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust,

> or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 715."
>
> *Civ. Code,* Section 771.
>
> "The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest, within the meaning of this part of the code."
>
> *Civ. Code,* Section 749.

The above provision of the Constitution which prohibits a perpetuity and the above sections of the Civil Code which declare that the absolute power of alienation may not be suspended for a longer period than either the continuance of lives of persons in being when the suspension is created or for a period not to exceed twenty-five years from the creation of such suspension are applicable to the illegal Irvine trust.

The Trust Created by the James Irvine Indenture of Trust Was Not a Charitable Trust.

The indenture of trust contains no statement of general purposes. The first clause, which names the parties, does not even identify "The James Irvine Foundation, a corporation organized and existing under the laws of the State of California, trustee," as a charitable corporation. The following paragraph to the clause that names the parties to the indenture of trust, which has been erroneously referred to as the only transfer or conveyance clause of the Irvine stock to the Irvine Foundation, as trustee, makes no reference therein to any charitable purposes for which the Irvine stock is to be held in trust, but said paragraph does state specifically that the purported transfer and assignment of the 505 shares of Irvine stock, was to be held in trust

"nevertheless and for the following trust uses and purposes". It is significant that the foregoing quoted provision does not state, "nevertheless, and for the following *'charitable'* trust uses and purposes". It is therefore apparent from the beginning paragraphs of the indenture of trust that it was not the intention of James Irvine to create a wholly charitable trust, but that it was his definite intention as further expressed in paragraph 2 of the indenture of trust that a private trust with noncharitable purposes was intended by Mr. Irvine to be created under the terms and provisions of said indenture of trust, together with a trust for certain purposes that were alleged would be charitable. There is no segregation or division of the 510 shares of Irvine stock which constituted the trust *res* as between the private and noncharitable purposes and the alleged charitable purposes that are set forth in the indenture of trust. The present number of shares of the Irvine Company stock, due to stock redemptions, that constitutes the present corpus of the trust is 459 shares. There is no segregation or allocation of said 459 shares of Irvine Company stock so that a certain amount or number of the 459 shares could be set apart or designated as the individual trust property that could be identified as a separate corpus for two trust estates, one for private and noncharitable purposes and the other for charitable purposes. The expressed intent by James Irvine to create a private noncharitable trust and a charitable trust out of the same trust fund is made abundantly clear in paragraph 1, on page 6 of the indenture of trust, which describes the post mortem powers of the trustee in connection with the post mortem control and dominion of the trustee over the Irvine Company stock, and which states that the trustee *"shall hold, maintain and administer the same (the Irvine Company stock) under this trust as a unit without division or segregation thereof"*.

Paragraph 2 of the indenture of trust, pages 4 and 5, already has been alluded to as the private noncharitable investment power that compels the trustee, to each year set aside such sum out of the balance of the income after the deduction of administration expenses and losses, as the board of directors of the trustee shall in its sound discretion deem wise and expedient for investment and that said trustee shall invest the same in accordance with paragraph 3 of the post mortem powers of the trustee thereafter enumerated, and which said investments, when made, shall become a part of the corpus or principal of the trust property, in perpetuity, and the income and profits therefrom shall thereafter be used, applied, and devoted as in said indenture of trust provided, to wit, for the same private and noncharitable investment purposes that are described in paragraph 2.

Paragraph 3 authorizes the trustee to make any investments which the trustee shall decide upon, whether or not permissible by law as investment for trust funds. It is therefore apparent that the trustee may take all or part of the balance of the income received from dividends on the Irvine stock and, as provided in paragraph 2, and use the same to purchase and operate any private business enterprise for profit with no restriction of any kind.

Paragraph 4, page 7 of the indenture of trust, states:

> "All discretions in this trust conferred upon the Trustee shall, unless specifically limited, be absolute and uncontrolled, and their exercise by the Board of Directors of the Trustee conclusive on all persons interested in this trust."

The first paragraph in the Irvine indenture of trust that makes any reference whatever to the intention of James Irvine, as trustor, to create a partial charitable trust, is paragraph 3 on page 5, and is subordinated

to the private investment trust that is created in paragraph 2, and which paragraph 3 states:

> "*The balance of said income, after the deductions and investments hereinabove provided,* shall be used, applied and devoted by the Trustee exclusively to or for the advancement of any charitable use or purpose in the State of California as now is or may hereafter be authorized in the Articles of Incorporation of the Trustee and as the Board of Directors of the Trustee shall from time to time, in its discretion, select and determine;"

It is therefore clear from the foregoing charitable subordination provisions in said paragraph 3 of the indenture of trust that the intention of James Irvine in creating said trust was private and noncharitable, and that the trust was not to be wholly for public and charitable purposes.

Prior to the execution of the indenture of trust on February 24, 1937 several letters were exchanged between Mr. Irvine's attorneys W. H. Spaulding and James G. Scarborough, and Mr. Irvine, with reference to the provisions of the proposed indenture of trust. On July 2, 1936, Mr. Scarborough wrote a letter to Mr. Spaulding and therein stated that the noncharitable investment provision to be contained in paragraph 2 of the indenture of trust was based upon the mandatory instructions of James Irvine that the trustee be compelled to invest some portion of the income for the purpose of building up the estate of the Foundation [Ex. A-20, Tr. 3680]. We therefore have a declaration of intent by James Irvine, as trustor, which he made before the indenture of trust was executed on February 24, 1937, and which removes any doubt whatever with reference to the intention of James Irvine that the trust created by said indenture of trust

must contain private and noncharitable purposes to which all or part of the income from the Irvine stock dividends must be devoted, to wit, for investments to be made by the trustee each year, and in perpetuity, as the trustee shall in its sound discretion deem wise and expedient. Attorney Spaulding, in his letter dated July 27, 1936, to Attorney Scarborough [Ex. A-21, Tr. 3681], confirms his understanding of Mr. Irvine's intention with reference to the noncharitable investment provision set forth in paragraph 2 with the statement in said letter as follows:

> "Your suggested change in paragraph II on page 4 as set forth in your letter to Mr. Irvine of July 20, 1936, is to be adopted, subject to the suggestion that it read 'the Trustee may, and in the judgment of the Trustor should, each year, set aside' etc. What do you think of this. It avoids a mandate of doubtful legality."

But it did not. The provision with reference to making private noncharitable investments from the balance of the total income that is set forth in paragraph 2, pages 4 and 5 of the indenture of trust is therefore tied directly into the intention of Mr. Irvine that the trust created by him was for private and noncharitable purposes, and that the power and the discretion that was vested in the trustee to devote so much of the balance of the income for investment purposes as said trustee shall, in its sound discretion deems wise and expedient, certainly is not for a wholly charitable purpose.

The division of the balance of said income that may and under the mandatory direction of Mr. Irvine, as trustor, must be used for private investment purposes is not set forth in percentages of the whole or of a designated part of said income, and therefore, it is impossible to determine how or on what division basis the

trustee will exercise its sound discretion, and leaves to the trustee the unrestricted power and right to devote all of the balance of said income to private investment purposes and this private diversion of the balance of said income or any part thereof creates a private trust which violates the statute of perpetuities and therefore renders the entire trust illegal and void.

The trust must be interpreted as of the date of its inception, to wit, February 24, 1937, and as of this date the question of how long a period the trust is to exist and whether the trust is wholly charitable, or not wholly charitable, and, therefore, void and illegal. *Estate of Gump,* 16 Cal. 2d 525; 102 P. 2d 17; *Civil Code of California,* Sec. 749.

Unless the Trust Imposes a Mandatory Duty on the Trustee to Devote the Trust Fund to a Charitable Purpose and None Other the Trust Is Illegal, Void and Fails if Its Final Termination Is Beyond the Time Limited by the Rule Against Perpetuities.

The trust created by the Irvine indenture of trust contains private and noncharitable purposes, uses and objects, and also charitable and public purposes and uses, and under the law in California that has been established in the authorities hereinafter referred to the indenture of trust involved in this case does not contain a mandatory duty on The James Irvine Foundation, as trustee, to devote the whole trust fund, to wit, the dividend income received from the Irvine Company stock, entirely to a charitable purpose, and none other, and therefore said trust is illegal and void for the reason that it violates the law against perpetuities as established by Article XX, Sec. 9, of the *California Constitution,* and also violates the law established with reference to restraints on alienation. Statements of

the law that are enunciated in said California cases which are applicable to the void trust created by the Irvine indenture of trust, have been uniformly followed in other states as well as in England where similar trust instruments have been considered and passed upon by their courts. Appropriate extracts from all of said cases will be set forth in the Appendix to the brief of appellant. These cases are as follows:

In re Sutro's Estate, 155 Cal. 72; 102 Pac. 920;

In re Kline's Estate, 118 Cal. App. 514; 32 P. 2d 677;

In re Peabody's Estate, 21 Cal. App. 2d 690; 70 P. 2d 249;

In re Vance's Estate, 118 Cal. App. 163; 4 P. 2d 977;

In re Grigson v. Harding, 144 A.R. 2d 870;

Goetz v. Old Nat. Bk. of Martinsburg, W. Va., 84 S.E. 2d 759;

Scott on Trusts, Sec. 398.2(4).

The Trust Violates the Rule Against Perpetuities.

In this appeal we are concerned both with the rule against perpetuities and the rule against restraints upon alienation.

The Irvine indenture of trust provides that the trustee takes no beneficial interest in the corpus of the trust [Ex. A-1, Tr. 3674]. The real owner of property is one who has a beneficial interest therein, not the one who holds it as trustee for others. If a trust so provides that, one's legal or equitable interest in property may, *by any possibility,* become vested after designated lives in being and 21 years plus the period of gestation, then the trust provides for a perpetuity, within the

meaning of the California Constitution and as defined by common law and as interpreted by the California court decisions hereinbefore referred to. Thus, the rule against perpetuities states the time within which property must vest, and provides that if, *by any possibility,* the time for vesting set forth in the indenture of trust may be beyond the period of time limited by the rule, a perpetuity is created.

Because the corpus of the Irvine trust was to be tied up for a longer period of time than the California Constitution allowed, it was a grant in perpetuity. The trust principal was tied up because it could never be disposed of, but was to be held forever and the beneficial interest in that principal was never to vest in anyone. Thus the Irvine trust creates, clearly, a perpetuity.

The *California Civil Code* sections 715, 716, 771 and 749 limit the period of time in which alienation may be restrained to "lives in being, or 25 years" and this limitation applies even though property is vested. The rule means that the trust must terminate within some designated lives in being when the trust was created, or in 25 years. The power to dispose of trust property in exchange for the property then received which is to be held under the same trust does not satisfy the requirement of the above described sections of the California Civil Code. If a trustee cannot convey the absolute fee—so that there will no longer be a separation of beneficial interest and legal title at all—within the period of the lives of designated persons in being plus 21 years after the creation of the trust, the trust is not only a perpetuity but also a restraint upon alienation within the meaning of sections 715, 716, 771 and 749, of the *California Civil Code.*

A violation of either the rule which prohibits the holding of trust property in perpetuity or the rule against the restraints on alienation is vital to a trust,

unless the holding of the trust property is for eleemosynary purposes solely, entirely and unequivocally.

The Irvine trust provided for a holding of trust property for a period longer than lives in being or 25 years. As long as the trust was to exist, in fact forever, the trustee was to hold the legal title separated from any beneficial interest in the property which constituted the trust *res*. The Irvine trust is not a wholly charitable trust and both rules therefore are violated and the trust is illegal and void.

In the case of *Estate of Cavarly,* 119 Cal. 406, 409, 51 Pac. 629, the Supreme Court defined the rules as to perpetuities and as to restraints upon alienation as follows:

> "The two rules are, of course, quite different. One requires that within a fixed period there be persons in being capable of conveying an absolute interest in possession. That is the rule against restraints on alienation. The other requires that within a fixed period the absolute interest must vest. That is the rule against perpetuities, or, more, accurately, the rule against remoteness of vesting.
>
> "The common law judges were much concerned with preventing the tying up of estates for long periods of time. Text writers are agreed that, when property was tied up in such fashion, it was known as a 'perpetuity.' Two methods were devised at common law to prevent this tying up process. The first and original method was to require that estates be alienable within a fixed period which ultimately became fixed at lives in being plus 21 years. The second was devised as early as 1685 in the *Duke of Norfolk's Case,* 3 Ch. Cases 1 (1685). It requires the vesting of estates within lives in being. Gray, Rule Against Per-

petuities (4th ed.), sec. 2.1, p. 4; Rest., Property (div. IV), p. 2123 *et seq.*) By the middle of the Eighteenth Century the vesting period had become fixed at lives in being, plus 21 years, plus the period of gestation. (Gray, Rule Against Perpetuities (4th ed.), sec. 169 *et seq.*, p. 161 *et seq.*)"

The court reviews the history of the rule against perpetuities and the rule against restraints on alienation.

The court quoted from *Estate of McCray,* 204 Cal. 399, as follows:

" 'The rule against restraints on alienation has been, in some cases, confused with the rule against perpetuities; but the two rules, while having the same end in view, viz., that of preventing undue interference with the freedom of transfer of property, are of entirely different origin and application. The rule against perpetuities, engrafted upon our system by the Constitution, relates only to future interests in property, the vesting of which is to be postponed beyond the alloted time. The rule relating to restraints on alienation, on the other hand, is statutory in origina, and has reference to an undue prevention of the transfer of estates already vested. . . .' "

The court concluded:

"We conclude this phase of the discussion with the holding that in this state we have both the rule against restraints on alienation, with its statutory period of lives in being or 25 years, and the rule against remoteness of vesting, with its common law period of lives in being and 21 years. While such a holding makes the work of the draftsman of wills a difficult one, such argument should be addressed to the Legislature and not to the courts."

As to whether the provisions in question violated the rule against perpetuities, the court stated:

> "Moreover, it is not the 'probability' of a violation of the rules against remoteness or restraints on alienation that brings such rules into operation, but only the bare 'possibility,' as such 'possibility' exists at the date of the inception of the trust."

A Trust in Perpetuity in Which the Alleged Charitable Purpose Is Not Clearly Charitable Is Illegal and Fails.

In *Estate of Peabody,* 21 Cal. App. 2d 690, the testatrix disposed of the residue of her estate as follows:

> "(7) The balance of the estate to be liquidated then to go to an institution for old people in memory of my beloved Mother and Father, Mr. J. Haskell is to make the choice of the institution."

The court said at page 691:

> "Appellants maintain the (1) paragraph seven is valid because it can be construed to create a lawful private trust, and, (2) that it is valid because it can be construed to create a charitable trust. Each of these arguments refutes the other, because, generally, if the provisions of a will which attempt to create a trust are so uncertain that they may be construed to create either a private or a charitable trust it has been usually held that the purported trust failed because of uncertainty in the instrument which attempted to create it. In *Estate of Hinckley,* 48 Cal. 457, at 509, it is said:
>
> " 'Where a bequest is made for charitable purposes and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void. If, for instance, a bequest is made for such charitable, or other purposes, as the trus-

tee should think fit, the whole bequest, will be void for uncertainty.' (Tudor on Charitable Trusts, 223.) It was said by counsel (arguendo) 'the principle of all cases is, that the portion of the trust that might otherwise be construed as charitable, can not be sustained, because the trustees have an election to apply the fund to purposes not technically charitable.'

"That the will fails to create a valid private trust is apparent from a reading of the trust provision. It violates the rule against perpetuities. (Sec. 715, 772, *Civ. Code.*) (*Estate of Hinckley, supra.*) The beneficiary under the trust, or the clas sfrom which it may be selected by the trustee, is not made certain in the instrument attempting to create it."

The court cited the *Estate of Ralston,* 1 Cal. 2d 724, and continued:

"Under paragraph seven of the will it would seem clear that the trustee could nominate as the beneficiary under the trust, or the class from which people' that was either charitable in its purposes or was organized for profit. The will contains no limitation on the power of selection by the trustee that would require him to select a charitable institution as beneficiary."

The court then quoted from *In re Shattuck's Will,* 193 N. Y. 446, and then said at page 693:

"It is well known that there are many charitable institutions that are organized and exist solely for the purpose of caring for needy old people. It is equally well known that there are other such institutions organized and conducted for private profit. Both classes may be composed of deserving institutions in that they provide repose and care

> for the aged. The deceased used no appropriate language in her will to designate either of these classes. We cannot rewrite her will. We must construe it as she wrote it. The conclusion that the testatrix had in mind either a charitable institution or one organized for private profit would be based on conjecture and not on anything written in the will. In order to avoid intestacy, either partial or complete, we are not permitted to place on the will any construction not expressed in it and which is based on supposition as to the intention of the testatrix in the disposition of her estate. (*Estate of Hoytema,* 180 Cal. 430)."

The court agreed that the trust was void and that the sole surviving heir inherited the entire estate.

Indefiniteness of purpose prevents the Irvine trust from being a valid charitable trust. No charitable purpose is stated as to the use of the entire income which constitutes the trust *res.* No general purpose is stated at all. The trustee is given unlimited discretion, to use all or part of the balance of the income for noncharitable purposes.

When a gift to charity fails the law gives the property to the testator's heirs.

> See *Estate of Mathies,* 64 Cal. App. 2d 767; 149 P. 2d 485.

The trust expressed in the Irvine indenture of trust was clearly at the time it was created and in perpetuity a trust the purposes of which are not definitely such as to compel the trustee to devote the entire trust income wholly to charity. The trust therefore is not a charitable trust.

The Trust Violates the Rule Against Restraints on Alienation.

The *California Civil Code,* Sec. 679, provides:

> "The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws."

The fact the trustees had a power of sale does not save the trust from a violation of the rule.

> "The mere power of sale does not, under such circumstances, save the provisions of the trust, since the proceeds of the sale are still to be held in violation of the law. (Civ. Code secs. 715, 771; *Estate of Hinckley,* 58 Cal. 457, 481; *Hawley v. James, supra; Haynes v. Sherman, supra.*) Nor is it the law of this state that the provisions against restraints upon alienation do not apply to trusts of personal property. . . ."
>
> *In re Walkerly,* 108 Cal. 627 at 656.

As said *In re Steele Estate,* 124 Cal. 533, and repeated in the *Estate of Troy,* 214 Cal. 53, and applicable to both the rule against restraints on alienation and the rule against perpetuities:

> "The Statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results; but if, under the terms of the deed or will creating the trust, when properly construed, the instrument 'by any possibility, may suspend' the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created nor any estate."

The rule against restraints on alienation applies to personal property as well as to real property.

> "Again, Section 771 of the Civil Code shows plainly the applicability of the law to personal property. For if it be only the suspension of the power to alienate real property which is under the ban, power to sell the realty would relieve the difficulty, and yet it is by that section expressly declared that personal property held after sale under the terms of the original trust operates to suspend the power of alienation, under Section 715 of the Civil Code. And finally, the applicability of Section 715 to trusts in personal property has often been recognized, and never questioned. (Estate of Hinckley, *supra;* Goldtree v. Thompson, 79 Cal. 613; Williams v. Williams, 73 Cal. 99; Whitney v. Dodge, 105 Cal. 192.)"
>
> *In re Walkerly,* 108 Cal. 627 at 656.

In *Shean v. Michel,* 6 Cal. 2d 324, at 327, the court said:

> "If the trust thus attempted to be created is by its terms designed to be continued during the minorities of children born after the delivery of the trust instrument, it is obvious that the instrument creates a suspension of the power of alienation in violation of the provisions of section 715 of the Civil Code. That section provides that, except in the single case mentioned in section seven hundred seventy-two, which exception is not material herein, 'the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows: 1. During the continuance of the lives of persons in being at the creation, of the limitation or condition; or 2. For a period not to exceed twenty-five years from the time of the creation of the suspension.' The possibility of the suspension of the

power of alienation created by the contingency that all of the persons in being at the time of the creation of the trust may die before the youngest unborn child becomes twenty-one years of age, or the possibility of the suspension beyond the twenty-five year period, renders the trust void at its creation and title does not vest in the trustee. (Secs. 716, 749, 771, Civ. Code; *Estate of Troy,* 214 Cal. 53, 56 (3 Pac. (2d) 930).) Section 716 declares that 'every future interest is void in its creation which, *by any possibility*' may suspend the power of alienation longer than the Code permits. This possibility is to be determined by the conditions existing 'at the time of the creation of the limitation of future interest. . . .'—in this case at the time of the execution and delivery of the trust instruments. (Secs. 749, 771, Civ. Code.) ' "The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity (suspension) results, but if under the terms of the deed or will creating the trust, when properly construed, the instrument 'by any possibility may suspend' the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created nor any estate vested in the trustees." (*Estate of Steele,* 124 Cal. 533, 537 (57 Pac. 564); . . .' (*Estate of Whitney,* 176 Cal. 12, 15, 16 (167 Pac. 399); *Estate of Maltman,* 195 Cal. 643, 649 (234 Pac. 898); *Estate of Tory, supra,* p. 57.)"

The Irvine trust was an express written indenture of trust which provided that the principal should be held and the beneficial interest not vest, not only beyond the period of time allowed by law, but forever, and therefore a perpetuity; and as it was a perpetuity and provided for purposes not wholly charitable it was pro-

hibited by the *California Constitution,* Article XX, Sec. 9; and it was also in violation of, and declared illegal and void as in restraint upon alienation, by the *California Civil Code* Sections 715, 716, 749 and 771.

The purposes of the attempted Irvine trust were illegal and void and in violation of the aforesaid provisions of the California Constitution and the sections of the California Civil Code because:

(a) The purposes provided for possible vesting beyond the period of time allowed by law—a perpetuity.

(b) The purposes provided a holding beyond the period of time allowed by law—a restraint on alienation.

(c) Part of the purposes described in the indenture of trust left it wholly in the discretion of the Irvine Foundation, as trustee, to select the objects and purposes and the amounts to be distributed to each; and made it possible without violating the trust provisions to distribute the trust income to noncharitable and private purposes in perpetuity.

(d) Charitable and noncharitable designated purposes were provided for as well as other purposes not restricted to charity, and all to be paid out of the income from the same principal which was to be held in perpetuity. No means were provided for or were legally possible for a division between the charitable and noncharitable purposes therefore the whole, as declared by the California cases cited above, is noncharitable and such a trust in perpetuity and/or in restraint of alienation is illegal and void and fails on that account.

The Irvine Indenture of Trust Must Be Interpreted Within Its Four Corners.

In *Estate of Young,* 123 Cal. 337, 55 Pac. 1011, the court said:

> "It is true that courts have always leaned to construction which will avoid intestacy, and their swift

willingness in this regard has passed into a rule of construction, but there are well-defined limits beyond which the courts have not gone, and beyond which they could not go without subverting all rules and leaving the interpretation of every will to the mere caprice and whim of the chancellor. One of these rules, firmly established, and never departed from nor even criticized, is that *the expressed intent will not be varied under the guise of correction* because the testator misapprehended its legal effect. The testator is presumed to know the law. If the legal effect of his expressed intent is intestacy, it will be presumed that he designed that result. The injury will not go to the secret workings of the mind of the testator. It is not, what did he mean? but, it is, what does his words mean? In Bingel v. Volz, 142 Ill. 214, 34 Am. St. Rep. 64, it is well said: 'The purpose of construction as applied to wills is unquestionably to arrive if possible at the intention of the testator, but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will.' (Citing cases.)

"The case thus presented is one where the expressed intent of the testatrix is plain, but where a full performance of the acts which she has directed will amount in law to nothing. The testatrix, it may be assumed, did not understand the legal effect which would follow a compliance with her will, or thought that the legal effect would be other than it is. But a court for this reason is not justified in speculating over what it may believe to have been her intent in place of the directions which she has actually employed. The inquiry of the court in construing a will comes to an end when the in-

tent has been discovered from the language of the will. Its duty is then limited to giving effect to that intent so far as may be, without doing violence to express law or the mandates of public policy. *It is never at liberty to supply omissions* or to wrest language from its plain import, and give it such a meaning as it may be guessed the testatrix would have intended if she had known that her own efforts to create a legal devise had resulted in failure. (In re Walkerly, 108 Cal. 659; 49 Am. St. Rep. 97.) Here, to repeat, there is no doubt as to the language and its meaning. The testatrix merely mistook the legal effect which would follow a compliance with her directions. While no form of expression is required to create a devise, and while considering that wills are frequently made by ignorant people in a great extremity of sickness, and under an impending fear of immediate death, and while therefore, much liberality is and should be shown in construing the term of such instruments, in every case some words must be employed from which under the rules of law an expressed intent to devise particular real estate must be found in the will itself; otherwise the court is not carrying out the last will of the deceased, but is making testamentary disposition of his property for him; not such disposition as the testator made, but such disposition as the court thinks he would have made. This can never be permitted." (Italics ours).

In *Estate of Sessions,* 171 Cal. 346, 153 Pac. 231, the court said at page 349:

"The paramount object in resolving an ambiguity in a will is to ascertain the intention of the testator. All other of the established rules of

construction are designed to assist in this main object. *But the intention sought for is not that which may have existed in the mind of the testator, but that which is expressed in the language of the will,* giving such language, if clear, its ordinary meaning, and if ambiguous, the meaning it should have, in the light of the contest and the circumstances shown to explain the meaning. (Estate of Young, 123 Cal. 344, (55 Pac. 1011); Estate of Tompkins, 132 Cal. 176, (64 Pac. 268).)" (Italics ours).

In *Estate of Hoytema,* 180 Cal. 430, 213 Pac. 53, as to the rule that a will should be liberally construed to carry out the intent of the testator, the court said:

> "This intent, however, must be found in the language used in the will taking into view in cases of uncertainty arising upon its face the circumstances under which it was made."

In *Estate of McKay,* 42 Cal. App. 316, 183 Pac. 574, a devise in a will read as follows:

> "I give, devise and bequeath all my estate, real and personal, whatsoever and wheresoever, in manner following: To my wife Elizabeth M. McKay, the one-fifth (1/5th) part thereof, and to each of my children Horton L. McKay and Ethel M. McKay the undivided fourth-fifths (4/5ths) part thereof."

> "It is undoubtedly settled law relative to the interpretation of wills that the intent of the testator must be extracted from the express terms of his will, and that courts are not permitted to indulge in conjecture or surmise for the purpose of arriving at an intent which is not reasonably to be drawn from the language of the document itself."

In *Estate of Doane,* 190 Cal. 412, 213 Pac. 53 at 415 the court said:

> "The decedent having made an invalid provision in clear, unequivocal, language, *the courts are without power to alter that language to express what may have been in the testator's mind* but was not attempted to be expressed by him, however beneficent such unexpressed intent may have been. 'It may be said of all wills, that the testator's intent is to make a valid disposition of his property . . . But a court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court, had he known his own attempt was invalid.' (Estate of Walkerly, *supra,* 627, 659.)" (Italics ours).

> "For the duty of the court is to interpret not to construct; to construe the will, not to make a new one."

Herzog v. Title Guarantee & Trust Co., 177 N.Y. 86;

U.S. Security Trust Co. v. Petrillo, 220 N.Y. Supp. 635, 641.

> "The paramount rule of construction is that if other wise legal, the intent of the parties is to prevail but such intent is the *express intent* as written and is to be derived where possible from the document itself considered as a whole."

Petition of Tuckermow, 60 N.Y. Supp. 2d 734; citing

Farmer's Loan & Trust Co. v. Callen, 246 N.Y. 481, 487;

Buffalo E.S.R.R. Co. v. Buffalo Ft. A.R. Co., 111 N.Y. 132, 139.

> "The rules of construction are well settled. The intention of the grantor is the intent revealed in the trust instrument not his secret wishes, desires or benefits after the event. The court is limited to the four corners of the instrument."
>
> *City Bank Farmers Trust Co. v. McFadden,* 65 N.Y.S. 2d 395.

Not only does it appear from the express language contained in paragraph 2 of the Irvine indenture of trust that the trustee is required to invest all or part of the trust income each year and in perpetuity, but further that when said income is so invested that it shall become a part of the corpus or principal of the trust and thereafter be frozen in perpetuity and never be available for charitable purposes. It should also be recalled that in the letter from Attorney Scarborough to Attorney Spaulding dated July 2, 1936 [A-20, Tr. 3680], Mr. Scarborough stated that Mr. Irvine desired that the investment provisions to be contained in the indenture of trust and which were set forth in Mr. Scarborough's letter, be submitted to Mr. Spaulding, so that at the next conference between Mr. Irvine and Mr. Spaulding upon Mr. Irvine's return to San Francisco, the same could be discussed, and Mr. Scarborough made the further significant statement:

> ". . . it is Mr. Irvine's desire that the trustee be *compelled* to invest some portion of the income for the purpose of building up the estate of the Foundation".

On July 27, 1936, Mr. Spaulding replied to Mr. Scarborough's letter of July 2, 1936 [Ex. A-21, Tr. 3680] and stated:

> "Your suggested change in paragraph II of page 4 as set forth in your letter to Mr. Irvine of July 20, 1936, is to be adopted subject to the suggestion

that the trustee may and in the judgment of the trustor should each year set aside, etc."

It therefore appears that not only is it clear from the four corners of the indenture of trust that James Irvine intended primarily that under paragraph 2 thereof all or part of the income of the trust must be used for private and noncharitable purposes, to wit, investments, and that under paragraph 3 the balance of said income, if any was left after the investments were made, could be devoted to public and charitable uses, but that this intention is further confirmed by the two letters that were exchanged between Mr. Irvine's attorneys Messrs. Spaulding and Scarborough, hereinabove referred to.

Upon the Failure of the Irvine Trust on the Death of James Irvine the Plaintiff Athalie Irvine Smith and His Other Legal Heirs Take the 459 Shares of Irvine Company Stock Held in Trust by the James Irvine Foundation, as Trustee.

In Pomeroy's Equity Jurisprudence, Sec. 1032, it is observed that with reference to trusts created where the property is conveyed by will or deed and the purposes fail in whole or in part, or the trusts are so uncertain and indefinite that they lapse or are illegal, a trust results in favor of the grantor or his heirs.

Civil Code of California, Sec. 866, provides:

"Where an express trust is created in relation to real property every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors."

The rule against restraints on alienation applies to personal property as well as real property. In *re Walkerly,* 108 Cal. 627; 41 Pac. 772. Under the provisions of Sec. 866 of the *Civil Code,* James Irvine, during his life was the beneficial owner of the 510 shares of Irvine

Company stock held under the 1937 indenture of trust, and the trust having failed because of illegality no named beneficiary took any interest thereunder.

In *In re Wittfield v. Foster,* 124 Cal. 418; 57 Pac. 219, the court said:

> "Under the circumstances, where the trusts declared in an instrument are illegal, or for any reason void, either the trustee takes no estate, or there is a resulting trust to the grantor or his heirs; and in the case at bar it is immaterial which of these results follow."

In this appeal it is not material whether James Irvine, during his lifetime, as the grantor of the Irvine Company stock purportedly conveyed in trust, was the beneficiary of a resulting trust or whether the Irvine Foundation, as trustee, took no estate; whether James Irvine held an equitable interest as a resulting trust beneficiary or also the legal interest; because his grant failed, makes no difference because his heirs took whatever his property rights were, be they legal or equitable or both. In no case can the defendant The James Irvine Foundation benefit by a failure of the trust.

When a trust is void or illegal, as in the present case, those who are named therein as beneficiaries take no interest.

In the case of *Booge v. Reinicke,* 45 Cal. App. 2d 60; 113 Pac. 481, the court said:

> "Whatever may be the rule in other jurisdictions, it has been definitely held in this state that where a trust is void as a legal restraint upon alienation (*Civil Code,* Sec. 715), no title or right whatever is acquired either by the trustee or any of the beneficiaries."

Under the authorities hereinabove cited the established law in California is that a trust in perpetuity which

is partly for charitable purposes and partly for non-charitable purposes, is illegal and void and fails.

It is also the established law in California that the heirs of the trustor succeeded to the trust property after the failure of such a trust.

In *Estate of Walkerly,* 108 Cal. 627, 41 Pac. 772, it was said:

> "The determination that the trusts are void renders unnecessary any consideration of the other points presented. The trusts being void, it follows as to the property attempted to be devised in trust, that the testator died intestate. It therefore descends to the heirs living at the time of his death. For the foregoing reason the decree is reversed."

In *Campbell-Kawannanakoa v. Campbell,* 152 Cal. 201, 92 Pac. 184 it was said:

> "The trust here, therefore, was void as to the real property of deceased situated within the State of California. It follows that as to such property the deceased died intestate, and the same descended by succession to his heirs at law . . ."

To the same effect:

In re Whitney's Estate, 176 Cal. 12;
In re Maltman's Estate, 195 Cal. 643;
Estate of Van Wyck, 185 Cal. 49.

In *Estate of Peabody,* 21 Cal. App. 2d 690; 70 Pac. 249, it was said:

> "Where a trust as to a residue was held invalid because of uncertainty as to whether it created a charitable or non-charitable trust, the decree of the probate court giving the property to the sole heirs of the decedent was affirmed."

In another part of this brief we will point out that James Irvine died intestate as to the Irvine Company

stock that is involved in this case. Under the cases above cited it is the established law in California that during his lifetime James Irvine either conveyed no title, so that no title or right was ever acquired by the defendant The James Irvine Foundation, as trustee, or any of the beneficiaries, or that James Irvine was the beneficiary of a resulting trust. In either case the plaintiff Athalie Irvine Smith and his other heirs are now entitled to the Irvine Company stock.

The Exercise of Acts of Ownership and Dominion by the Trustor as Well as the Absence of Such Acts on the Part of the Trustee Are Evidentiary Circumstances and the Cumulative Effect of Such Evidence Is Sufficient to Establish the Non-Delivery of the Irvine Company Stock by the Trustor to the Trustee.

The substantial evidence established that commencing in 1936 N. Loyall McLaren discussed with James Irvine a plan for Mr. Irvine to dispose of the major part of his estate to wit, his shares in The Irvine Company, upon his death, which would preserve and perpetuate the Irvine Ranch in Orange County, California, as a perpetual monument to James Irvine and would protect his estate from the payment of ruinous Federal estate taxes and California inheritance taxes which eventuality would happen if the Irvine Ranch or the majority stock in the Irvine Company became an asset in Mr. Irvine's testamentary estate [Tr. 286-295].

Mr. McLaren testified that he convinced Mr. Irvine that the vehicle to be set up to accomplish this two-fold purpose was a charitable *foundation*. No other plan was considered [Tr. 256]. Following this discussion Mr. Irvine consulted his attorneys Mr. Spaulding in San Francisco and Mr. Scarborough in Los Angeles with reference to the legal steps that were necessary

to put the appropriate vehicle organization into effect. Said attorneys expressed their opinions to Mr. Irvine that there should be two organizations or entities involved to accomplish the plan or the vehicle which had been discussed, to wit, a California charitable corporation to be organized under the name of The James Irvine Foundation; the directors of said corporation and the members thereof would be the agents and employees and attorneys of Mr. Irvine and would also include Mrs. Irvine, and second, an indenture of trust to be executed by Mr. Irvine as trustor and The James Irvine Foundation corporation, as trustee. Mr. Irvine would make a colorable transfer of 505 shares of the stock of the Irvine Company to said Irvine Foundation, as trustee, and the provisions of the indenture of trust would provide that said trust would not become operative or absolute until after the death of Mr. Irvine, and no powers, rights, privileges or title to the Irvine Company stock would vest in said Irvine Foundation, as trustee, until after the death of Mr. Irvine [Tr. 295-296, Exs. A-1, Tr. 3674, A-15—A-25, Tr. 3679-3682].

During the year 1936 several drafts of the indenture of trust were prepared by attorneys Spaulding and Scarborough. During the course of preparing said drafts certain letters passed between Attorney Spaulding and Attorney Scarborough and Mr. Irvine. These letters throw considerable light on the intention that was expressed by Mr. Irvine in the provisions of the indenture of trust which was executed on February 24, 1937. It appears from the contents of said letters that the principal objective to be achieved under the indenture of trust was that Mr. Irvine would remain during his lifetime as the absolute owner of the 505 shares of the Irvine Company stock and that at all times during his lifetime he would have the dominion and control over said Irvine Company stock and The Irvine

Company and The Irvine Foundation, as trustee and, furthermore, that the title to the Irvine Company stock would not become vested in The James Irvine Foundation, as trustee, until after the death of Mr. Irvine. This intention on the part of Mr. Irvine is referred to in the letter dated May 25, 1936, from Mr. Spaulding to Mr. Irvine. This letter was introduced in evidence as Exhibit A-15 [Tr. 3679]. In this letter Mr. Spaulding states:

> "Mr. McLaren, the other day, suggested that the indenture of trust give more duties to the trustee. The fact is, however, that with a *depositary,* and in view of the *limited purposes* of the trust during your lifetime, the trustee will, in fact, have little to do".

It is therefore apparent from said letter that Mr. Irvine intended that there would be no divestment of his beneficial ownership of the 505 shares of Irvine Company stock or his dominion and control not only over such stock, but also over The Irvine Company and The James Irvine Foundation, during his lifetime [Exs. A-15, A-25, Tr. 3679-3682]. The indenture of trust carries out this intention of Mr. Irvine as under the provisions contained therein, particularly paragraphs 3 and 5, it is provided that no powers, rights, privileges or title connected with the Irvine Company stock will become vested in the trustee until after the death of Mr. Irvine. Furthermore, under the provisions of the indenture of trust no powers or duties were vested in the trustee until after Mr. Irvine's death. The indenture of trust does not contain the provision that Mr. Irvine shall have the power to direct the trustee concerning the administration of the trust during his lifetime, and this reserved power was not considered because Mr. Irvine did not change his ownership status of the Irvine Company stock until after his death and there-

fore it was not necessary for the indenture of trust to provide, as such trust instruments do in cases where the trustor makes a conveyance of the title to the trust property that is *in praesenti* but reserves to the trustor the right and the power of either personally conducting the management of the trust or to direct the trustee as to how said trustee shall exercise its trustee duties and powers. It would also be incompatible with the expressed intention of Mr. Irvine that title to the Irvine Company stock was transferred immediately by Mr. Irvine where it appears in Mr. Spaulding's letter that E. M. Price who was to have the custody with Mr. Irvine of the Irvine Company stock during Mr. Irvine's lifetime would *only be a depositary,* which would exclude any intention by Mr. Irvine that the legal title was to vest in the Irvine Foundation, as trustee, during the lifetime of Mr. Irvine. The status of a trustee is not that of a depositary, but in a true trust such trustee would be the owner of the legal title to the corpus of the trust. This intention of Mr. Irvine that he would remain as the absolute beneficial owner of the Irvine Company stock with all the appurtenances and rights that an owner of property has during his lifetime is again expressed in a letter from Mr. Spaulding to Mr. Irvine dated June 12, 1936 [Ex. A-16, Tr. 3679].

In this letter Mr. Spaulding advises Mr. Irvine that certain differences have arisen between himself and Mr. Scarborough with reference to the functions of the proposed trust and the proposed Irvine Foundation corporation. Mr. Spaulding states that, in his opinion, upon the death of Mr. Irvine the property, to wit, the Irvine Company stock, should go absolutely to the Irvine Foundation to be used by that Foundation for any of the charitable purposes within the scope of the purposes set forth in its articles of incorporation, but that in the opinion of Mr. Scarborough the Irvine

stock should go to the Irvine Foundation, as trustee, after the death of Mr. Irvine and be held by the trustee under the provisions of the indenture of trust and that said Irvine Company stock upon the death of Mr. Irvine should not go directly to the Irvine Foundation corporation in accordance with the recommendations of Mr. Spaulding.

Again it is made quite clear in Mr. Spaulding's said letter to Mr. Irvine that the vesting of the legal title ownership in the Irvine stock in the trustee shall not become operative or absolute until after the death of Mr. Irvine regardless of whether the stock goes outright to the corporation or goes only to the corporation as trustee. It is therefore clear that Mr. Irvine was to continue to be the absolute beneficial owner of the Irvine Company stock during his lifetime but that the physical possession thereof would be in himself and or E. M. Price as his agent and not with the Irvine Foundation, as trustee. It is therefore apparent that James Irvine continued to have the dominion and control over the Irvine Company stock as the real beneficial owner thereof during his entire lifetime.

In a letter from Mr. Scarborough to Mr. Spaulding dated June 19, 1936 [Ex. A-17, Tr. 3680], Mr. Scarborough stated that "Mr. McLaren had suggested that from a tax standpoint the certificates of stock should not remain in the name of James Irvine but that the proposed transfer of the stock under the provisions of the indenture of trust "should be further *carried out in form* by endorsement of the certificates and their delivery to and acknowledgment by the Foundation". Mr. Scarborough then further stated that in compliance with Mr. McLaren's suggestion, that Mr. Scarborough himself suggested to Mr. Spaulding that the certificates of stock remain in Mr. Irvine's name, but

that they be endorsed by Mr. Irvine and delivered to Miss Price. Now, Miss Price since 1917 had been the confidential secretary to Mr. Irvine and therefore her primary and superior relationship to Mr. Irvine was that of an agent who was subject to Mr. Irvine's control and domination. Mr. Irvine, over the years since 1917, had placed great trust and confidence in Miss Price as his confidential agent and had given her access since December 17, 1928 until he died, to his safe deposit box in the Crocker Bank in San Francisco, and this safe deposit box contained millions of dollars of negotiable bonds and securities that belonged to Mr. Irvine [Ex. B-15, Tr. 2084], which indicates that his trust and confidence as well as the superior agency relationship between Mr. Irvine and Miss Price was very great indeed [Ex. A-65, Tr. 561]. Mr. Scarborough further suggested that the certificates of Irvine Company stock, when delivered to Miss Price would be in her ostensible capacity as the proposed secretary of the Irvine Foundation corporation. Then follows the sentence in said letter which conclusively established the relationship of Miss Price as the custodian and depositary of the 510 shares of the Irvine Company stock as that of the agent of Mr. Irvine regardless of whether or not she would also be the "dummy" secretary for Mr. Irvine of the Irvine Foundation corporation, the *alter ego* of Mr. Irvine, because she was to keep the Irvine Company stock in the safe in Mr. Irvine's office in San Francisco which would also be the paper office of the Foundation.

The Irvine Foundation corporation was incorporated on January 7, 1937, and the first meeting of its incorporators was held on February 1, 1937, and on the same date the directors who were named in the articles of incorporation held their first meeting and elected the officers of the corporation. Myford Irvine, the only

living son of James Irvine and the employee and agent of James Irvine, was elected the "dummy" president; E. M. Price, who, since 1917 had been the confidential secretary and agent of James Irvine, was elected the "dummy" secretary-treasurer. At this meeting no mention whatever was made with reference to any gift of Irvine stock by Mr. Irvine to the Foundation, as trustee, nor anything else connected with the Foundation, as trustee under the provisions of the indenture of trust. It is therefore obvious that the Irvine Foundation was to have no powers or duties, as trustee, during the lifetime of Mr. Irvine nor to have any ownership, title to, or interest in the Irvine Company stock during his lifetime. No resolution of appreciation to Mr. Irvine for the creation of the said trust or the colorable gift of said 505 shares of Irvine Company stock was adopted either at this meeting or at any other meeting of the board of directors or the members of The James Irvine Foundation that was held during the lifetime of Mr. Irvine.

Following the execution of the indenture of trust on February 24, 1937 no change whatever took place in the status of James Irvine as the owner of the 505 shares of Irvine Company stock that is described in said indenture of trust, or in his dominion and control over The Irvine Company, as well as his control of The James Irvine Foundation that was staffed with his employees, agents, attorneys and tax advisers as its directors and officers, and who in such capacities were subject to his directions and orders. The records of The Irvine Company, including the minutes of the meetings of the stockholders and directors of said corporation, the income tax returns of the said Irvine Company, and the acts and declarations of Mr. Irvine, indicated no change whatever with reference to his absolute control and dominion over the 505 shares of Irvine Company stock [Exs. 2-3; Tr. 3647].

The deposition of George L. Beaubien was introduced in evidence by the defendant Foundation. Mr. Beaubien testified that he had worked for Mr. Irvine as bookkeeper from May 20, 1917 until the date of Mr. Irvine's death on August 24, 1947 [Tr. 891-892]. Mr. Beaubien testified that he took care of Mr. Irvines books and of the various enterprises in which Mr. Irvine had an interest—Mr. Irvine's personal books and various enterprises [Tr. 892-893]. George L. Beaubien went to work for Mr. Irvine in 1917 and at that time T. V. Maxwell was Mr. Irvine's secretary and Miss E. M. Price also worked in Mr. Irvine's office as a stenographer [Tr. 893]. Mr. Beaubien took the job of a previous bookkeeper [Tr. 894]. Myford Irvine worked in his father's office all of the time until after his father's death; that no other persons than those identified worked in said office during the lifetime of Mr. Irvine [Tr. 895]. Mr. Irvine came to his office from 1917 until he died, and he worked there periodically; he would go down to the Ranch at times and then he would go hunting and fishing. He usually spent a couple of months during each year at the Irvine Ranch in Orange County, California [Tr. 896-897]. Mr. Irvine had all of his personal books covering his personal accounts, and all records of transactions and his journals and ledgers and cash books and trial balance books in his office at 820 Crocker Building, San Francisco [Tr. 899-900]. There were some books of the Irvine Foundation that were kept in Mr. Irvine's office and he also kept copies of certain entries of The Irvine Company that were made down at the Ranch, where copies of said entries were sent up to the San Francisco office and Mr. Beaubien then kept

a record of certain accounts [Tr. 900]. Mr. Beaubien stated that he was the only one that made entries in Mr. Irvine's books; that the said entries covered Mr. Irvine's security holdings and property holdings [Tr. 900]. Mr. Beaubien stated that he knew nothing whatever about the 1937 indenture of trust and never saw a copy thereof until subsequent to 1952. All that he knew was office gossip; Mr. Irvine told him nothing [Tr. 969].

Charles N. Whitehead gave the same testimony as a witness during the trial as had Mr. Beaubien, to wit, that he never saw any entries concerning the 1937 indenture of trust in any of Mr. Irvine's books when he reviewed them each year, commencing in 1937 and until Mr. Irvine died in 1947, in connection with the preparation by Mr. Whitehead of Mr. Irvine's personal income tax returns [Tr. 2866-2867].

With reference to the statement of Mr. Beaubien that he never saw the indenture of trust until after 1952, the District Court took particular notice thereof and in its memorandum and findings said Court made the following statement, to wit:

> "George L. Beaubien gave testimony by way of deposition. He was the personal bookkeeper and accountant for James Irvine until his death in 1937. He took care of the personal business papers, books and records of James Irvine. . . . He further testified, in substance, that he had not seen the indenture of trust during his period of service with James Irvine." [R. 162].

The substantial evidence further established that Mr. Irvine was meticulous about the entires that he insisted be set forth in his books of account by Mr. Beaubien,

as indicated by letters sent by Mr. Irvine to McLaren, Goode & Co., his tax advisers and accountants, dated July 11, 1936, and February 6, 1939 as follows:

"July 11, 1936

"Messrs. McLaren, Goode & Co.
444 California Street
San Francisco, California

Gentlemen:

Referring to my declaration of trust dated August 17, 1935, whereunder Kathryn Anita Lillard, et al, are beneficiaries, and of which a duplicate original is held by your office.

Under the provisions of Article 7th thereof, I wish to advise you that I have this day released said beneficiary from the obligation to pay me ten thousand dollars ($10,000.) under the provisions of Article 1st of said declaration of trust.

As a result of this release, the lien created by said Article 1st against the income from the corpus of the trust property in the sum of one hundred thousand dollars ($100,000.) is reduced to ninety-thousand dollars ($90,000.).

I wish to advise you further that I have made appropriate entries in my personal books which record the gift of ten thousand dollars ($10,000.) to Kathryn Anita Lillard.

Yours truly,

(signed) JAMES IRVINE"

On February 6, 1939 Mr. Irvine sent the following letter to Messrs. McLaren, Goode & Co., 444 California Street, San Francisco, California:

"Gentlemen:

Referring to my declaration of trust dated August 17, 1935, whereunder Kathryn Anita Lillard, et al, are beneficiaries, and of which a duplicate original is held by your office.

Under the provisions of Article 7th thereof, I wish to advise you that I have this day released said beneficiaries from the obligation to pay me seventy-thousand dollars ($70,000.) under the provisions of Article 1st of said declaration of trust. As a result of this release the lien created by said Article 1st against the income from the corpus of the trust property in the sum of one hundred thousand dollars ($100,000.) has been satisfied in full and there is no remaining lien against the trust property.

I wish to advise you further that I have made appropriate entries in my personal books which record the gift of seventy-thousand dollars ($70,-000.) to Kathryn Anita Lillard.

(Signed) James Irvine"

[Ex. B-15, Tr. 2084].

This exhibit B-15, the Irvine estate tax return contains copies of the above indicated letters from James Irvine and are marked "Exhibit G-2" to "Exhibit G-5", inclusive, of said estate tax return.

The above mentioned letters that Mr. Irvine sent to his accountants and tax advisers, which was the firm of N. Loyall McLaren, clearly indicates how metic-

ulous Mr. Irvine was with reference to the entries that were contained in his books of account with reference to all of his business transactions, particularly including any indenture of trust which was executed by him as trustor, and any gifts which were made by him in connection with said indentures of trust. Said letters further disclose that a duplicate original of the indenture of trust described therein was deposited with Mr. McLaren's accounting office. It is therefore very significant that the 1937 indenture of trust between James Irvine, as trustor, and The James Irvine Foundation, as trustee, was never entered in the personal books of account of Mr. Irvine nor was any duplicate original, or even a copy thereof ever filed with Mr. McLaren's accounting office [Tr. 306-308]. This evidence leaves but one conclusion, and that is that James Irvine never intended that the 1937 indenture of trust would be operative or absolute during his lifetime and, further, that he never intended that the title to the 510 shares of Irvine Company stock would vest in The James Irvine Foundation, as trustee, until after his death.

Also attached to Exhibit B-15 [Tr. 2084] are copies of pre-nuptial and ante-nuptial agreements entered into by Mr. Irvine with his wife Katharine Brown Irvine, and copies of trust indentures executed by him during his lifetime, and other documents which disclose how meticulous and careful Mr. Irvine was with reference to having all of the transactions involved with his property holdings and business interests definitely stated in said various legal documents and reflected by entries in his books of account. These documents are referred to in said Exhibit B-15 [Tr. 2084], as Exhibits G-1, G-7, G-8, G-9, G-9A, G-10, G-11, G-12, G-13, G-14, G-15, G-16; also Exhibits G-17 to G-23, inclusive,

which refer to cash gifts made by James Irvine, and Exhibit G-25, which is a deed of gift from James Irvine to The James Irvine Foundation.

The minutes of the meetings of stockholders and directors of The Irvine Company were introduced in evidence as Exhibit 2 [Tr. 3647]. These minutes commence with the directors meeting held June 3, 1935, and conclude with the last meeting of the board of directors that was held on April 28, 1947. James Irvine died on August 24, 1947. These minutes all disclose that no change whatever took place with reference to the ownership by James Irvine and his control over the 510 shares of Irvine Company stock that is described in the 1937 indenture of trust from the first meeting on June 3, 1935, to the last meeting on April 28, 1947. At no place in said minutes is there any indication whatever that The James Irvine Foundation, as trustee, had any interest in or title to the 510 shares of Irvine Company stock. During the period from 1937 to 1947, although Myford Irvine was the "dummy" president of The Irvine Foundation and as such acted for his father James Irvine, Myford Irvine, although a substantial stockholder himself in The Irvine Company as well as a director and vice-president thereof, never attended a single meeting—either the special or the annual meetings—of the stockholders of The Irvine Company, and Myford Irvine attended only two meetings of the board of directors of The Irvine Company during the said 10-year period.

Copies of the income tax returns of The Irvine Company during the period 1937 through 1948 are further cumulative evidence that during said period Mr. Irvine owned 547 shares of the stock of The Irvine Company, and that the defendant Foundation, as trustee, had no interest in or title to the 510 shares of Irvine Company stock during said period [Ex. 3,

Tr. 3647]. The minutes of a special meeting of the directors of The James Irvine Foundation held on September 19, 1947, following the death of Mr. Irvine on August 24, 1947, further establish that said defendant Foundation, as trustee, never claimed that it held any interest in or title to the said 510 shares of Irvine Company stock during the lifetime of Mr. Irvine [Ex. A-14, Tr. 3678]. Said 510 shares of Irvine Company stock were not transferred to the Irvine Foundation on the books of The Irvine Company until November 13, 1947 [Ex. D-1, Tr. 2325] when a certificate of stock for 510 shares was first issued to the Irvine Foundation [Ex. 21, Tr. 2814]. During the lifetime of James Irvine he never filed a copy of the 1937 indenture of trust with the Irvine Company or sent any communication of any kind to the Irvine Company concerning the execution by him of the 1937 indenture of trust or that it even existed. On November 11, 1947 a copy of said indenture of trust was sent by E. M. Price, as secretary to the executors of the Estate of James Irvine, to Mr. Hellis as secretary of The Irvine Company [Ex. D-3, Tr. 2937].

During the 10-year period following the execution of the 1937 indenture of trust James Irvine not only owned the 510 shares of Irvine Company stock that was described in said indenture of trust and which he voted as the owner and holder of said shares either in person or by proxy at every annual stockholders meeting held by The Irvine Company during said 10-year period but, in addition thereto, he voted either as trustee or by proxy every other share of Irvine Company stock outstanding, including the remaining 490 shares, to wit, 200 shares which he held as trustee and voted for the plaintiff-appellant Athalie Irvine Smith, 50 shares which he held as trustee and voted for Kathryn Anita Lillard, 40 shares for the trustee Anglo-California Trust Company, and 200 shares that he voted by proxy for his son Myford Irvine, a total of 490 shares.

The business of The Irvine Company was conducted as usual by James Irvine as the president and general manager thereof during said 10-year period, the same as the affairs of the said Irvine Company had been managed and controlled by Mr. Irvine since the year 1894 when the Irvine Company was incorporated and James Irvine became the president thereof and continuously thereafter during his lifetime served as the owner president thereof during said period. As such president and general manager, The Irvine Company during said 10-year period produced agricultural crops and carried on the other business connected with the operation of the Irvine Ranch and received therefrom the total amount of nineteen million, six hundred twenty-seven thousand, four hundred seventy-one dollars ($19,627,471) [Ex. 3, Tr. 3647]. The services and efforts of James Irvine during said 10-year period as the controlling individual stockholder and trustee stockholder and president of The Irvine Company were certainly responsible for the very substantial amount of money the corporation received and which indicates the extent of the ownership interest and activity of Mr. Irvine in The Irvine Company during said 10-year period that is in question in this case.

Extracts from the following cases in support of the law that is applicable to the foregoing statements of the cumulative evidentiary facts that established the ownership by Mr. Irvine of the 510 shares of Irvine Company stock during his entire lifetime are set forth in the Appendix to appellant's brief, to wit:

Blackburn v. Drake, 27 Cal. Rptr. 651;

Obranovich v. Stiller, 34 Cal. Rptr. 923;

Lawson v. Lowengart, 50 Cal. Rptr. 186;

Atl. Nat. Bank of Jacksonville, v. St. Louis Union Tr. Co., 211 S.W. 2d 2.

The Absence of Any Acts of Ownership or Dominion by the James Irvine Foundation, as Trustee, Over the 510 Shares of Irvine Company Stock During the 10-Year Period of James Irvine's Lifetime Following the Execution of the Indenture of Trust When Coupled With the Exercise of Acts of Ownership and Dominion Over the Irvine Company Stock During Said 10-Year Period by James Irvine Lead to the Conclusion That the Irvine Company Stock Was Not Delivered by James Irvine to the James Irvine Foundation, as Trustee, With the Intent That the Title Thereto and the Ownership and Dominion Thereover Would Be Effective Immediately or at All During the Lifetime of James Irvine.

The minutes of the meetings of the members and directors of The James Irvine Foundation during the period 1937-1947 disclose that no business whatever was transacted by said Irvine Foundation following the execution of the Irvine indenture of trust on February 24, 1937 until after the death of James Irvine on August 24, 1947 [Ex. A-14, Tr. 3678]. The first meeting of the incorporators of the Irvine Foundation was held on February 1, 1937 in the office of James Irvine, 820 Crocker Building, San Francisco, California, which was the paper office that the Irvine Foundation continued to use during said 10-year period.

We have heretofore alluded to the fact that the Irvine Foundation and The Irvine Company were both *alter egos* of James Irvine. The Irvine Foundation was controlled and directed by Mr. Irvine to the same absolute degree that he controlled The Irvine Company during his entire lifetime. The directors of the Irvine Foundation Corporation and the officers thereof, to

wit, his son Myford Irvine and his confidential secretary Miss E. M. Price, who were "dummy" president and "dummy" secretary-treasurer, and his employee Paul A. Dinsmore, who Mr. Irvine named as the "dummy" vice president but who had no duties as such, all of whom were placed in their respective positions because they were the employees, agents and "dummy" officers and directors of Mr. Irvine.

Equity looks through form to substance and there was no legal difference whatever between James Irvine, the individual, and his two corporate entities, *i.e.,* The Irvine Company and The James Irvine Foundation. These corporations existed in paper name only and were at all times merely the vehicle or device that James Irvine used to transact his own personal business. From the first meeting of the Foundation corporation directors on February 1, 1937 to the meeting on June 10, 1947, the last meeting held before the death of James Irvine, the Irvine Foundation corporation transacted no business except to adopt resolutions accepting donations that were made to the Foundation corporation as outright gifts by James Irvine. Mr. N. Loyall McLaren testified that Mr. Irvine attended all of these meetings [Tr. 77-78].

The books and records of account of the Irvine Foundation corporation [Ex. A-76 and A-77, Tr. 2088] establish that the Irvine Foundation corporation received no money or property from any source other than James Irvine or his *alter ego* The Irvine Company. These cash donations which were deposited in the bank account of the Irvine Foundation corporation amounted to nothing more than a re-deposit by Mr. Irvine of said cash donations from his own name to the name of the Irvine Foundation corporation. Said cash donations, which commenced in December, 1937 and ended in 1947,

amounted to a total sum of $166,000. that came directly from James Irvine and a further sum of $40,000. that came from The Irvine Company. This money was held by the Irvine Foundation corporation as capital assets. Not one single dollar from the $166,000. donated by James Irvine personally was distributed during the lifetime of Mr. Irvine or subsequent thereto for charitable purposes. In addition to these cash donations Mr. Irvine made two real property gifts to the Irvine Foundation corporation which were carried on the books of the Foundation corporation at the value of $52,500.

Although the Irvine Foundation corporation ostensibly commenced business on February 1, 1937, it made no charitable contributions until November 30, 1938, when the sum of $1,000. was contributed to the San Francisco Community Chest. During the 10-year period, 1937-1947, charitable contributions were made by the Foundation corporation in the aggregate amount of $28,450. The books and records of account of the Irvine Foundation corporation [Ex. A-76, A-77, Tr. 2088] during said 10-year period further disclose that the Foundation corporation had no current obligations or disbursements connected with any matters that were transacted in the office of James Irvine. No rent was paid to James Irvine for the 10-year use of his office by the Foundation corporation. The Foundation corporation did not have a telephone of its own nor did it pay any service charge for the use of Mr. Irvine's telephone. It purchased no stationery or letterheads, bought no postage stamps, had no petty cash fund for sundry items such as messenger service, pencils, erasers, etc., and had no equipment of any kind that could be utilized for any business purpose to be transacted by the Foundation corporation for the reason that the Foundation corporation had no business

to transact during the said 10-year period. The Foundation corporation nominally paid Miss E. M. Price, who had been the confidential secretary for James Irvine since 1917, a small stipend for her minimal clerical services such as making bank deposits in the savings accounts and other minor matters that were attended to by her. Miss E. M. Price as the "dummy" secretary-treasurer of the Foundation Corporation did not receive any compensation for her services as such officer. She was continuously during said 10-year period in the employ and on the personal payrool of James Irvine as his confidential secretary. Commencing with the fiscal year 1940-1941 Miss Price received a lump sum of $75.00 for her incidental clerical services on behalf of the Foundation corporation, and for the period commencing with the fiscal year 1941-1942 and ending with the fiscal year 1946-1947, she received $120.00 per year in the form of a monthly stipend of $10. This rate of compensation to Miss Price indicates that as Mr. Irvine's "dummy" secretary-treasurer of the Irvine Foundation corporation for said 10-year period prior to the death of Mr. Irvine, she devoted practically none of her time to her ostensible position as secretary-treasurer of said corporation for the obvious reason that there was nothing for her to attend to.

No salary or compensation was paid by the Irvine Foundation corporation to any of its officers during said 10-year period. Neither Myford Irvine, as the "dummy" president for his father, nor Paul A. Dinsmore, as the "dummy" vice president for his employer James Irvine, received any money as compensation for his services and this was proper because neither of said officers rendered services of any kind to the Irvine Foundation corporation and there was no requirement for them to do so. Both of these indivi-

duals were on the personal payroll of Mr. Irvine or The Irvine Company, his *alter ego,* during the said 10-year period. It is therefore obvious that the entire operation of The James Irvine Foundation corporation during said 10-year period amounted to nothing more than the use of said Foundation corporation's name by James Irvine as his *alter ego* and as an agency vehicle or conduit to receive from him certain sums of money and real estate as his tax-deductible charitable contributions which thereby gave an illusory front to the Irvine Foundation as a charitable corporation. There was no difference between what the Irvine Foundation corporation indirectly did during said 10-year period and what James Irvine himself could have directly done personally and with a far more beneficial result had his donations been given directly to charity instead of being frozen into the capital assets of his *alter ego,* The James Irvine Foundation. In fact, when the veil is pierced and the form ignored and the real substance behind The James Irvine Foundation is placed in its right perspective we find that said corporation was but another name for James Irvine. It transacted no business whatever except the business of James Irvine during said 10-year period, and the relationship between James Irvine and said Foundation corporation during said 10-year period was strictly that of principal and agent or at the most James Irvine the man and his shadow or *alter ego,* which was called The James Irvine Foundation, a corporation. It is to be noted that the word "charitable" is not included in the name of said The James Irvine Foundation, a corporation. It was nothing more than a device that permitted Mr. Irvine to eat his cake and have it too. When the Irvine Foundation corporation ostensibly commenced business on February 1, 1937, the date of the first

incorporators meeting, and until December 31, 1937, it had no bank account and no money. Although the books of account of said corporation [Ex. A-76, A-77, Tr. 2088] show the first entry as being the receipt of $5,000. on December 31, 1937 as a gift from James Irvine, said books of account disclose that they were not purchased by the Irvine Foundation corporation until April 29, 1938 as the entry in the cash book reflecting this purchase indicates that said books of account were bought from A. Carlisle & Co. on said date for the sum of $3,40. It is therefore clear that said Irvine Foundation was without funds of any kind until James Irvine made his cash gift of $5,000. on December 31, 1957, which year-end gift was made by Mr. Irvine as a charitable income tax deduction which he took on his personal income tax return for the year 1937. Under these circumstances and from the entries in the Irvine Foundation corporation's cash book, ledger and journal, and as disclosed by the minutes of the meetings of the members and directors of the Irvine Foundation corporation during said 10-year period, one conclusion only can be reached, and that is that The James Irvine Foundation, as trustee, was a paper myth or ghost trustee that had no real existence and possessed no powers or had any duties whatever during said 10-year period, and that the purported trust created by the Irvine indenture of trust dated February 24, 1937 had no life, no vitality or energy and was not operative or absolute during the lifetime of James Irvine.

There is not a single entry in said books of account or in the minutes of the members and directors meetings of said Foundation corporation that discloses that any business at all was transacted by the Irvine Foundation, as trustee, under the said Irvine indenture of

trust during the lifetime of James Irvine or that any powers or duties were vested in or performed by said Irvine Foundation, as trustee, until after the death of James Irvine on August 24, 1947. James Irvine had first to die before his ghost trustee could walk. Each cash gift made by James Irvine to the Foundation corporation during said 10-year period was accompanied by a letter, and each of said letters was copied into the minutes of the members and directors meetings of said Foundation corporation during said 10-year period. In each of said letters James Irvine stated that the donation was a gift absolute to the Foundation corporation and specifically not subject to the terms of the post mortem indenture of trust. It is therefore clear from each of said letters that James Irvine intended that the records of the Foundation corporation, which he controlled, would show that each such donation was a gift absolute to the Foundation corporation and was to be separate from the post portem provisions of the Irvine indenture of trust which was not to be operative or absolute until after his death.

The District Court, in its Memorandum which also contained the said Court's findings of fact, made the following reference to the outright gifts that James Irvine made to the Irvine Foundation, as follows:

> "James Irvine made a number of gifts to the Foundation which do not involve the stock of The Irvine Company. Those gifts are not involved. There was not involved the status of The James Irvine Foundation. It was and is a valid charitable corporation." [R. 155].

The books and records of account of the Irvine Foundation Corporation do not bear out the statement of the District Court to the effect that said corporation was

and is a valid charitable corporation because during said 10-year period, out of the personal cash gifts of James Irvine totalling $166,000., for which he took a deduction on his income tax returns for each year in which said gifts were made, not one dollar thereof found its way to a single charity. The only money that was distributed to charitable organizations or purposes during said 10-year period was in the total amount of $28,450., which was derived solely from rentals received by said Foundation corporation from the real estate donated to it by Mr. Irvine [Ex. A-76, A-77, Tr. 2088]. This small amount of rental income was all that was distributed to charity over said 10-year period and gives doubtful support to the legitimacy of the said Foundation corporation as a valid charitable corporation. Inasmuch as James Irvine took deductions as charitable contributions for the full amount of his said donations to the Foundation corporation, the full amount thereof in kind should have been passed on to needy charitable organizations and not retained by the Foundation corporation as a capital asset. His entire donations, both cash and real estate, were treated as deductible charitable contributions on his income tax returns during said 10-year period, when in truth not one dollar thereof ever found its way to charity.

The practice followed by James Irvine in making said cash and real property donations to the Irvine Foundation corporation and the freezing thereof into capital assets bears out the contention of the appellant that it was the intention of Mr. Irvine in connection with the inclusion of paragraph 2 in the indenture of trust, that the post mortem Foundation corporation trustee was to invest each year, in perpetuity, all or part of the dividend income received from the Irvine Company stock in order to build up the corpus of the trust, and

this intention of Mr. Irvine conclusively established that said trust was a private and noncharitable trust which was illegal and void as being in violation of the law of perpetuities and restraints on alienation.

After the first meeting of the incorporators of The James Irvine Foundation on February 1, 1937, a meeting of the members and directors of said corporation was held, on May 25, 1937, at which meeting there was adopted a resolution that approved the purported execution of the indenture of trust dated February 24, 1937, by Myford Irvine as his father's "dummy" president and by E. M. Price as Mr. Irvine's "dummy" secretary-treasurer of said Foundation corporation, and approved the purported acceptance of the trusts described in said indenture of trust, to wit, both the noncharitable and the charitable trusts contained therein, and the purported delivery of the Irvine Company stock to the Irvine Foundation, as trustee, by said "dummy" officers, and at a meeting on December 31, 1937, received a cash donation from James Irvine of $5,000, and on December 31, 1938 accepted an additional cash donation of $8,000. and certain real estate, yet no income tax returns were filed by said Irvine Foundation corporation for the years 1937 and 1938. On June 14, 1939 said Foundation corporation —but not as trustee—filed its first income tax return. No Irvine's stock assets were listed therein and no reference whatever was made to either the 1937 Irvine indenture of trust or the purported transfer of 505 shares of Irvine Company stock to The James Irvine Foundation, as trustee [Ex. A-21, Tr. 3681]. No copy of the Irvine indenture of trust was ever filed with the Treasury Department during the lifetime of James Irvine, as required by law and the instructions and regulations of the Internal Revenue Bureau [Tr. 2878].

After filing its first income tax return on June 14, 1939, an application was made by the James Irvine Foundation corporation—but not as trustee—for exemption from federal income taxation. On November 9, 1939 the Treasury Department acknowledged the receipt of said application in a communication addressed to The James Irvine Foundation, Room 820, Crocker Building, San Francisco, California, which was the personal office of James Irvine. The Treasury Department stated in said letter that said application presented evidence that James Irvine contributed $5,000. to the corporate fund in 1937, and that in 1938 he contributed additional cash and real estate. It is therefore apparent from said Treasury Department letter that said application of the Irvine Foundation corporation made no reference whatever to (1) the 1937 Irvine indenture of trust under which the Irvine Foundation corporation was the purported trustee, and (2) no mention whatever was made to any Irvine Company stock, particularly 505 shares of such stock, having been transferred by Mr. Irvine, in trust, to said Irvine Foundation corporation, as trustee. The absence in said application of any declaration or act indicating an ownership interest by the Irvine Foundation, as trustee, in the 505 shares of Irvine Company stock is cumulative additional evidence that said Irvine Company stock was not transferred to said Irvine Foundation corporation, as trustee, by Mr. Irvine, at any time during the lifetime of James Irvine.

Following the filing of its first income tax return on June 14, 1939, said Irvine Foundation corporation for each fiscal year thereafter during the lifetime of James Irvine, to wit, to and including April 30, 1947, made no reference in any of said income tax returns to said 1937 indenture of trust or the 505 shares of

Irvine Company stock having been transferred by Mr. Irvine to the Irvine Foundation, as trustee. Mr. Edward H. Cassells, Jr., an attorney at law who was associated with the law firm of O'Melveny & Myers of Los Angeles, California, testified and read into the record certain income tax laws and instructions and regulations that were applicable to charitable corporations as a trustee during the period 1936 through 1947. Mr. Cassells' testimony is set forth in Volume 16, pp. 3557-3575, incl. of the Reporter's Transcript, and includes verbatim the rules and regulations and income tax provisions that Mr. Cassells' testified were applicable to The James Irvine Foundation, as trustee, during said period 1936-1947. Under these income tax instructions and regulations and the applicable income tax laws referred to by Mr. Cassells it appeared without contradiction that the Irvine Foundation, as trustee, was required by law and by said instructions and regulations to have filed a copy of the Irvine indenture of trust with the Treasury Department.

Mr. Charles N. Whitehead, who was a partner in Mr. N. Loyall McLaren's accountion firm, testified that no copy of the said indenture of trust was filed with the Treasury Department during the lifetime of Mr. Irvine [Tr. 2878]. The testimony and documentary evidence produced by Mr. Cassells further established that the purported donation and gift by James Irvine of the said Irvine Company stock to the Foundation corporation, as trustee, was also required by the income tax laws and the regulations issued thereunder to be included in the schedule of assets or in a balance sheet that was required to be attached to each of the income tax returns during the period 1937-1947. None of the income tax returns of said Irvine Foundation,

as trustee, during said 10-year period disclosed in the schedule of assets or in any balance sheet attached thereto any reference to said Irvine Company stock as having been transferred by James Irvine to the Irvine Foundation, as trustee, nor was any claim made by said Irvine Foundation, as trustee that it had any interest whatever in the said 505 shares of Irvine Company stock. Again, the absence of any declaration or act by the Irvine Foundation, as trustee, in its income tax returns concerning its alleged ownership, as trustee, of the 505 shares of Irvine Company stock during the lifetime of James Irvine is substantial cumulative evidence that James Irvine never intended to transfer the Irvine Company stock or to vest any title, right, power or privileges thereto in the Irvine Foundation, as trustee, during his lifetime, as expressly provided in paragraph 3 of the indenture of trust, as follows:

> "To carry out the express purpose of this trust and in aid of its execution and the proper administration, management and application of the trust property, the Trustee is vested, *after the death of the Trustor,* with the following additional powers and discretions:
>
> "1. To have respecting the shares of stock hereinabove described and all other securities which may be held in this trust, all the rights, powers and privileges of an owner * * *"

Notices of regular meetings of the members and directors of The James Irvine Foundation are all on the personal letterhead stationery of James Irvine, copies of which are incorporated in the minutes of the mem-

bers and directors meetings held May 22, 1939, April 18, 1945, December 7, 1945, June 12, 1946, and June 10, 1947 [Ex. A-14, Tr. 3678]. These communications from E. M. Price, signed by her as Secretary of The James Irvine Foundation corporation, on the personal letterhead stationery of James Irvine, Crocker Building, San Francisco 4, California, clearly established that James Irvine and The James Irvine Foundation were one and the same person. It further appears from the minutes of the meetings of the members and directors of the Foundation corporation that Myford Irvine, "dummy" president, when sending communications to the directors also used the personal letterhead stationery of his father James Irvine, as evidenced by his letter dated April 17, 1945 [Ex. A-14, Tr. 3678]. The first notice sent by E. M. Price on the personal letterhead stationery of James Irvine was dated May 22, 1939, and the last notice sent by her, was dated on or about June 10, 1947, and gave notice of the regular annual meeting of the members for June 10, 1947. This is further substantial evidence that during the entire 10-year period of Mr. Irvine's lifetime the Irvine Foundation corporation was nothing more than his *alter ego,* and as such *alter ego* the officers and directors thereof, who were his agents and employees, and who were known in corporation law as "dummies", were dominated and controlled absolutely by James Irvine.

Mr. N. Loyall McLaren, as president of The James Irvine Foundation corporation, corroborated the contention of the plaintiff-appellant that James Irvine

never intended that title to or any rights, powers, privileges or interest in the 510 shares of The Irvine Company stock would become vested in said corporation as trustee until after the death of Mr. Irvine through the issuance of the following official statements that were contained in a letter dated February 2, 1965, to Wilbur D. Mills, Chairman, Committee on Ways and Means, to wit:

> "From 1947 when the Foundation's rights in the stock vested until March 31, 1965, The Irvine Company paid to its shareholders in the form of dividends 89.1 percent of its operating income.
>
> "Since this Foundation has owned more than 50% of The Irvine Company stock since 1947, it is appropriate to evaluate the compulsory divestitute proposal in the terms of the results that reasonably may be expected from its application to this corporation." [Ex. A-78, Tr. 2172].

On December 5, 1961, when Mr. McLaren was president of The James Irvine Foundation he issued a press release which stated as follows:

> 'The James Irvine Foundation holds controlling interest in The Irvine Company. Upon the death of James Irvine on August 24, 1947 the Foundation became the owner of 51% of the stock of The Irvine Company, the principal asset of which is the Irvine Ranch located in Orange County, California.
>
> * * *
>
> "From 1947, when the Foundation's majority stock ownership vested, until March 31, 1965, The Irvine Company paid out 89.1 percent of its net income after taxes to its shareholders in dividends." [Ex. A-51, Tr. 1425].

The 1957 Indenture of Trust Created a Mere Agency and Not a True Trust.

In different parts of Appellant's brief reference has been made to Myford Irvine and to E. M. Price as the "dummy" president and the "dummy" secretary-treasurer of The James Irvine Foundation, who were selected for said positions by James Irvine when the Irvine Foundation held its first meeting of the members and board of directors of said corporation on February 1, 1937. Both Myford Irvine, the only surviving son of James Irvine, and E. M. Price had been the employees and agents of James Irvine since 1920 and continuously thereafter until Mr. Irvine's death on August 24, 1947.

The word "dummy" in this brief is used in its legal corporation definition, and so is the word "tool" used in its legal agency definition. Both words imply that Myford Irvine and E. M. Price were not independent directors or officers of the Irvine Foundation corporation, but that they held their respective offices as the employees and agents of James Irvine and received their salaries from either James Irvine or The Irvine Company, the *alter ego* of James Irvine, and that as such agents or employees both Myford Irvine and E. M. Price were subject at all times to the Superior control and directions of their employer and principal, James Irvine.

Robert H. Gerdes, who acted as the attorney for James Irvine during his lifetime and who drew Mr. Irvine's last will and testament, testified as follows concerning the agency relationship between James Irvine and E. M. Price, to wit:

"She was in the office of Mr. Irvine and acted as secretary and handled many of the details of his affairs and I knew her almost from the time that I knew Mr. Irvine or maybe even before." [Tr. 1822]

Mr. N. Loyall McLaren, president of The James Irvine Foundation, gave the following testimony concerning the agency relationship between James Irvine and E. M. Price:

"Miss E. M. Price had been Mr. Irvine's personal secretary for a great many years. Mr. Irvine also had an office secretary, Mr. T. V. Maxwell, who was in general charge of the office. Upon the retirement of Mr. Maxwell, a number of years—I don't recall the exact number—before the creation of the Foundation, Mr. Irvine promoted Miss Price to be the office manager as well as his secretary." [Tr. 51].

The deposition of Mr. George L. Beaubien was read into the record by the defendant Irvine Foundation. Mr. Beaubien testified that he entered the employ of James Irvine as a bookkeeper in 1917 [Tr. 890]. That Mr. Irvine's office was at 820 Crocker Building, San Francisco, when Mr. Beaubien entered his employ as a bookkeeper. Mr. Beaubien continued to work for James Irvine as bookkeeper from 1917 up until the date of his death [Tr. 891]. That during that entire period of time James Irvine's offices were at 820 Crocker Building [Tr. 892]. That when Mr. Beaubien first went to work in the office of James Irvine, Mr. T. V. Maxwell was Mr. Irvine's secretary and Miss E. M. Price was a stenographer in the office of James Irvine [Tr. 893].

That later Myford Irvine came into the office someplace in the 20's, probably the early part of 1920 [Tr. 894]. That during the period 1917 through 1947 when Mr. Irvine died, no one else worked in the office except the ones that Mr. Beaubien had mentioned [Tr. 893]. During the period from 1937 to 1947 James Irvine had personally several safe deposit boxes in the Crocker Bank [Tr. 897]. That during the 10-year period before the death of James Irvine in 1947, Myford Irvine and Miss E. M. Price took care of putting things in and taking things out of the safe deposit boxes of James Irvine in the Crocker Bank [Tr. 902]. See also Exhibits A-65, Tr. 561, and A-66, Tr. 565, representing the agency authority that was separately vested in Myford Irvine and E. M. Price to have access to the safe deposit boxes of James Irvine in the Crocker Bank.

Extracts from the Law of Agency which are applicable to the evidence in this case that relates to the agency relationship between James Irvine and Myford Irvine and E. M. Price and The James Irvine Foundation, are set forth in the appendix to appellant's brief.

James Irvine Died Intestate as to the 510 Shares of the Irvine Company Stock That Are Described in the 1937 Irvine Indenture of Trust.

On May 14, 1946, James Irvine executed his last will and testament. This will was prepared by Robert H. Gerdes, who first became Mr. Irvine's attorney in 1936 when Mr. Gerdes was a partner in the law offices of Chaffee E. Hall in San Francisco. Mr. Gerdes was named as one of the executors and trustees in Mr. Irvine's last will and testament. Mr. Gerdes testified at

the trial concerning the discussions which took place between himself and James Irvine in connection with the preparation of Mr. Irvine's last will and testament.

N. Loyall McLaren, president of The James Irvine Foundation and the tax adviser of Mr. Irvine during his lifetime, also testified at the trial concerning several discussions which took place between himself and Mr. Irvine with reference to the planning of Mr. Irvine's estate.

The above mentioned testimony of Mr. Gerdes and Mr. McLaren is set forth in the appendix to appellant's brief.

Mr. Theodore R. Meyer, who was the attorney for Mrs. Athalie R. Clarke, as the guardian of the plaintiff Athalie Irvine Smith in connection with the estate of James Irvine, deceased, also testified at the trial at the request of defendant The James Irvine Foundation. During the examination of Mr. Meyer, he was requested to identify Exhibit B-21 [Tr. 699]. This exhibit was a copy of a memorandum dated October 13, 1950 prepared by Mr. Chaffee E. Hall who was the attorney for the executors of the Estate of James Irvine Deceased. Mr. Meyer's attention was directed to paragraph 11, page 8 of said Exhibit B-21, which reads as follows:

> "Mr. Meyer as attorney for Athalie (plaintiff-appellant) suggests that equitably some part of the inheritance tax imposed on Athalie on account of the James trust should be borne by the other family unit. His position, as we understand it, is that if Athalie is the only one of the children or grandchildren required to pay a tax on an inter vivos

transfer Irvine's intentions with respect to the apportionment of his estate among his descendants would be frustrated."

With reference to the foregoing statement Mr. Meyer was asked the following question:

"What facts did you have that you apparently stated to Mr. Hall that he has referred to in this paragraph 11 with reference to 'Irvine's intentions with respect to the apportionment of his estate among his descendants would be frustrated?' "

Mr. Meyer gave the following answer:

"This happened a long time ago, Mr. Young. I am having some difficulty bringing back anything more than appears in the papers, but it seems to me that our argument was basically that Mr. Irvine, Sr. must have had in mind a general testamentary scheme comprehending the inter vivos transfers and the bequests under his will, and he would not have intended, for example, that Athalie's 200 shares would bear an inheritance tax and Myford's 200 shares should not."

It is apparent from the testimony of Messrs. Gerdes, McLaren and Meyer that Mr. Irvine never intended that in the event the 1937 indenture of trust was rendered invalid that the 510 shares of Irvine Company stock would come under the trust provisions of his 1946 last will and testament, and it therefore follows that James Irvine died intestate with reference to the 510 shares of Irvine Company stock and that said Irvine Company stock, which now consists of 459 shares, belongs to the

surviving heirs of James Irvine in the following proportions, to wit:

Athalie Irvine Smith, daughter of James Irvine III, who died in 1935, and granddaughter of the decedent James Irvine, one-third (⅓), or 153 shares of said 459 shares; Kathryn Lillard Wheeler, daughter of Kathryn Irvine Lillard, who died in 1920, and granddaughter of the decedent James Irvine, one-third (⅓) or 153 shares; and Linda Irvine Gaeda and James Myford Irvine, the daughter and son of Myford Irvine, who died in 1959, and the granddaughter and grandson of the decedent James Irvine, one-third (⅓) or 153 shares jointly, or 76½ shares to each.

Conclusion.

It is respectfully submitted that the judgment of the District Court is against the substantial evidence and the law, and therefore said judgment should be reversed with directions to the District Court to enter judgment for the appellant that:

1. The indenture of trust between James Irvine, trustor, and The James Irvine Foundation, trustee, dated February 24, 1937, was void *ab initio;*

2. The defendant The James Irvine Foundation holds the 459 shares of the stock of The Irvine Company on a resulting trust for the legal heirs of James Irvine, Deceased;

3. The defendant The James Irvine Foundation and the defendant directors, members and trustees thereof be required, jointly and severally, to account to the appellant and the other legal heirs of James Irvine, De-

ceased, for all dividends, capital gains and other fruits received by said defendants above referred to from the 459 shares of The Irvine Company stock, together with interest thereon;

4. The defendant The Irvine Company be directed to cancel the said certificate for 459 shares of The Irvine Company stock standing in the name of The James Irvine Foundation, and to re-issue from said cancelled certificate 153 shares of The Irvine Company stock to appellant Athalie Irvine Smith, 153 shares of The Irvine Company stock to Kathryn Lillard Wheeler, and 76½ shares each of The Irvine Company stock to Linda Irvine Gaede and James Myford Irvine; and

5. Appellant have such other relief as the court considers appropriate to carry out the judgment of this court.

Respectfully submitted,

LYNDOL L. YOUNG,
Attorney for Plaintiff-Appellant
Athalie Irvine Smith.

Dated: May 29, 1968.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LYNDOL L. YOUNG,

APPENDIX.

Page References to the Reporter's Transcript Where the Exhibits of the Parties Are Identified, Offered, and Received or Rejected as Evidence.

PLAINTIFF'S EXHIBITS:

No.	Iden.	Rec'd	No.	Iden.	Rec'd
2		3647			
3		3647	16		264
4		3647	17		265
5		1493	18		266
8		3649	19		267
11		3650	20		2066
12		223	21		2814
13		236	22		3003
14		243	23		3657
15		246			

DEFENDANT'S EXHIBITS:

No.	Iden.	Rec'd	No.	Iden.	Rec'd
A		3674	A-40	110	3686
A-1		3674	A-41	110	3687
A-2		1414	A-42	110	3687
A-3		3675	A-43	110	3687
A-4		3675	A-44	110	3688
A-5		3675	A-45	110	3688
A-6		3676	A-46	110	3689
A-7		3676	A-47	110	
A-8		3676	A-48	110	3689
A-9)			A-49	110	3689
A-10)		3677	A-50	98	3690
A-11)			A-51	168	1425
A-12)			A-52	427	3690
A-13		3678	A-53	427	3690
A-14		3678	A-54	428	3690
A-15	30	3679	A-55	428	3691
A-16	31	3679	A-56	452	461
A-17	37	3680	A-57	456	461
A-18	37	3680	A-58	461	461
A-19	38	3680	A-59		538
A-20	40	3680	A-60		549

DEFENDANT'S EXHIBITS (Continued):

No.	Iden.	Rec'd
A-21	43	3681
A-22	44	3681
A-23	44	3681
A-24	45	3628
A-25	45	3628
A-26	62	3628
A-27	63	3683
A-28	110	3683
A-29	110	3684
A-30	110	3684
A-31	110	677
A-32	110	3684
A-33	110	3685
A-34	110	3685
A-35	110	3685
A-36	110	736
A-37	110	3684
A-38	110	3686
A-39	110	3686
B		2081
B-1		1122
B-2	652	653
B-3		1126, 477
B-4		1127
B-5		2081, 2942
B-6		1129
B-7		2081, 2942
B-8		1130
B-9		1133
B-10		2082
B-11		2082
B-12		2082
B-13		2082
B-14		2083
B-15		2084
B-16		1138
B-17		1141
B-18		1142
B-19		1143
B-20		1144
B-21		699
B-22		699

No.	Iden.	Rec'd
A-61		550
A-62		553
A-63		554
A-64		559
A-65		561
A-66		565
A-67		567
A-68		572
A-69		575
A-70		576
A-71		577
A-72		595
A-73		737
A-74		932
A-75		934
A-76		2088
A-77		2088
A-78		2172
B-47		767, 778
B-48		779
B-49		825
B-50		826
B-51		873
B-52		874
B-53		874
B-54		884
B-55		1119
B-56		1120
B-57		1135
B-58		1145
B-59		1148
B-60		1153
B-61		1155
B-62		1162
B-63		1168
B-64		1169
B-65		1177
B-66		1179
B-67		1180
B-68		1182
B-69		1184

DEFENDANT'S EXHIBITS (Continued):

No.	Iden.	Rec'd	No.	Iden.	Rec'd
B-23		1154	B-70		1185
B-24		1154	B-71		1187
B-25		752	B-72		1187
B-26		764	B-73		1194
B-27		770	B-74		1197
B-28		775	B-75		1198
B-29		687	B-76		1246
B-30		722			
B-31		679			
B-32		681	C		3371
			C-1		3372
B-34		709	C-2		764
B-35		741	C-3		3375
B-36		753	C-4		3261
B-37		754	C-5		3262
B-38		763	C-6	3198	3221
B-39		765	C-7		3253
B-40		766			
B-41		769	C-9		3298
B-42		770			
B-43		775			
B-46		778			
D		2193	G-11	1584	3695
D-1		2325	G-12	1584	3698
D-2		2328, 2942	G-13	1584	3698
D-3		2937	G-14	1585	3697
D-4		2937	G-15	1585	3697
			G-16	1586	3697
D-6	163	1488	G-17	1586	3698
D-7	166	2089	G-18	1587	3698
D-8		1726	G-19	1588	3698
D-9		1961	G-20	1591	3698
D-10		1969	G-21	1591	3699
D-11		1969	G-22	1592	3699
D-12		1972	G-23	1593	3699
D-13		1973	G-24	1593	
D-14		2563	G-25	1593	3700

DEFENDANT'S EXHIBITS (Continued):

No.	Iden.	Rec'd
E		2088
E-1		2089
E-2		2193
E-3		1397
E-4		1437
E-5		2126
E-6		2135
E-7		2159
E-8		2567
E-9		3187
F		1488
F-1		1488
F-2		1488
F-3		1488
F-4		1488
F-5		1488
F-6		1488
G-1		1570
G-2		1575, 3692
G-3		1578, 3693
G-4		1578, 3693
G-5		1579, 3694
G-6	1580	3694
G-7	1580	3694
G-8	1581	3695
G-9	1581	3695
G-10	1582	3695
G-26	1594	3700
G-27	1594	3701
G-28	1594	3701
G-29	1595	3702
G-30	1596	3702
G-31	1596	3702
G-32	1599	3703
G-33	1600	3703
G-34	1600	3703
G-35	1601	3704
G-36	1603	3704
G-37	1603	3704
G-38	1604	3705
G-39	1605	3705
G-40	1605	3705
G-41	1607	3706
G-42	1607	3706
G-43	1608	3706
G-44	1609	3706
G-45	1610	3707
G-46		3707
G-47	1612	3707
G-48	1613	3708
G-49	1614	3708
G-50	1615	3708
G-51	1616	3708
G-52	1616	3709
G-53	1616	3709
G-54	1617	3709
G-55	1618	3709

Testimony of Richard C. O'Connor.

"Q Now, with reference to those provisions which you have just read from the copy of the trust document that was furnished to you, I understand that those were the particular provisions that you considered in reaching your conclusion as you have stated in this letter or your suggestion, as I read the letter, not a conclusion, your suggestion that the trust may have been or might have been an agency, is that right?

A That's right.

Q Now, in reaching that suggestion that you made in your letter of August 6, 1949 to Mr. Hall, did you give any consideration or did you assume that the certificates of stock Nos. 28, 33 and 42, Certificate No. 28 being for 332 shares of Irvine stock, Certificate No. 33 for 132 shares of Irvine stock and Certificate 42 for 41 shares had been effectively transferred and delivered to The James Irvine Foundation?

MR. PRIVETT: I object to that question. If the question is what did Mr. O'Connor assume at the time he wrote that letter, I think that is wholly irrelevant and immaterial, what Mr. O'Connor assumed.

MR. YOUNG: Well, he had the trust agreement before him. It is so stated there.

THE COURT: He may answer.

A I did so assume that it had been effectively delivered.

BY MR. YOUNG:

Q To The James Irvine Foundation?

A The Foundation.

Q Is that correct?

A Yes." (Tr. 2616-2617)

* * * * *

"Q Thank you, sir. Now calling your attention, coming back again to the indenture of trust with which we are concerned here and which is referred to by paragraph fifth of your letter, had you known when you made this determination with reference to the non-taxability of the 1937 trust indenture, that Certificate No. 33 for 122 shares of Irvine Company stock and Certificate No.—

A 132.

Q—132 and Certificate No. 42 for 41 shares of stock were subsequent to February 24, 1937, to wit, in 1941, the year 1941 in the possession and under the control of Mr. Irvine, would that have had any effect on your determination that the 1937 trust was not taxable?

A Well, it would have strengthened my first suggestion that there was no actual trust but a mere agency created by this instrument of February 24, 1937, because it would appear that Mr. Irvine had control over not merely income and powers reserved, but over the actual corpus of the trust and if he reserved that, there is the fundamental thing, I certainly would have been slower to recede from the suggested position that I set forth in that letter.

Q Well, had that situation been brought to your attention, that is, the facts as I have related them in connection with Mr. Irvine having possession of those two certificates of stock representing 173 shares of The Irvine Company stock, what would you have done about it?

MR. PRIVETT: Your Honor, I must interpose just a formal objection and preserve the record here. This time, rather than stating it as an assumption, Mr.

Young has stated this as being a fact. There is no evidence in the record whatever to support Mr. Young's assertion of a fact that Mr. Irvine had these stock certificates in his possession in the forties.

THE COURT: It will be considered that he has assumed the fact, evidently.

MR. PRIVETT: Yes.

MR. YOUNG: Yes, your Honor, and also of course we had the testimony yesterday with reference to the certificates that I have just referred to being in his possession in 1941.

THE COURT: I mean you still have to deal with assumptions.

MR. YOUNG: That is right, your Honor, yes.

A Your question was whether, if I knew that he had them—

Q In 1941, which is four years subsequent to the date of the trust indenture.

A Yes.

Q Then what would you have done about it?

A It would have inclined me to the view more strongly than ever that no trust had been created, that he made a paper transfer merely of these shares, reserving the power to recall them when he wished, and that, therefore, they belonged in his estate and not in The Foundation." (Tr. 2619-2621, incl.)

* * * * *

"Q Mr. O'Connor, Mr. Privett referred to a letter in which you requested that you be furnished with Form 900, which I believe is the income tax return of a charitable corporation, is that right?

A Yes.

Q Were you furnished with that form?

A I believe I was. I believe it is in the file here.

MR. PRIVETT: I think that is Form 990.

THE COURT: 990.

MR. PRIVETT: 990?

BY THE WITNESS:

A Yes.

BY MR. YOUNG:

Q Is that the California form or the United Staes form?

A It is a federal form.

Q For what year is that?

A The year ending April 30, 1948.

Q That return, with the exception of a few months in 1947, May 1 to August 24, 1947 is all that represents the lifetime of Mr. Irvine, is that correct?

A That's right, I think.

Q He died on the 24th of August, 1947?

A Yes.

Q Were you furnished with any returns on this form 990 for The Foundation during the years from 1937 to May 1 or April 30, 1947?

A No. I am not sure that they were required as early as 1937.

Q You didn't receive any such returns?

A No.

Q At all, is that right?

A No, I did not.

Q If The James Irvine Foundation had made such returns to the United States Government and had not included in any one of those returns a single item or any indication at all with reference to its title to or ownership of 505 shares or 510 shares of Irvine Company stock, what would that have meant to you?

A It would have indicated to me that there would have been no transfer of that amount of shares to The Foundation.

Q Yes. And you have stated there was no such copy of any such return during those years furnished to you, is that right?

A Yes.

Q Mr. O'Connor, counsel, Mr. Privett read to you the indenture of trust of February 24, 1937, and you reread, as I understood it, the first clause there:

> "The trustor hereby transfers, assigns and conveys to the trustee to have and to hold in trust nevertheless and for the following uses and purposes the following securities, to wit."

Then for this immediate question the three certificates covering The Irvine Company stock are described.

A Totaling 505 shares.

Q Totaling 505 shares of stock.

A Yes.

Q As I understood your testimony on direct examination, it was that this paragraph, this assignment paragraph, indicated to you that the trustor, Mr. Irvine, had given up the control over the corpus of the trust insofar as The Irvine Company certificates are concerned, is that right?

A Yes.

Q Does that also apply to Mr. Privett's examination of you with reference to the same transfer insofar as the validity of the trust is concerned or was concerned when you examined it?

A Yes. I believe my reply to Mr. Privett's question was that my view of it, more as a matter of law than a matter of fact, is that language when signed by

the trustor and this instrument delivered to The Foundation or people representing The Foundation would in itself suffice to give rise to a valid trust whether or not the stock certificates were physically, manually

Q Yes, but then what do you mean when you say the control of the corpus of the trust if it still remained in Mr. Irvine, the trustor? Then it raised a question as to the validity of the trust. What do you mean by that?

A Even though there might have been a valid delivery of the certificates themselves, whether manually or symbolically by this instrument, if in fact it was not intended to and did not create a trust but merely an agency or custodianship, then it would terminate at his death and fall into the residue of his estate.

Q Yes. That is what I understood you meant by both of your answers, but your answer to Mr. Privett in view particularly of your former answer that under the circumstances which I related in the question and which I understood you to answer the way I have just stated to you, that it had only been a paper trust involved, that there was a surrender of the control of the corpus of the trust by Mr. Irvine.

A Yes.

Q Is that right?

A Yes.

Q And then when I asked you the question with reference to the matter assuming that in 1941 Mr. Irvine had the possession and the control of certificates 33 for 132 shares and certificate 42 for 41 shares, that woud mean what to you, as I understood you to say, it would mean that the trust was a paper trust, that he had the control of the corpus of the trust, is that right?

A Well, it would indicate to me that there never had been an effective transfer of ownership of those shares.

Q Yes. Well, that is what I understood, but I mean your later answer I thought required or indicated that there should be a clarification of your answer on direct examination as well as on cross examination by Mr. Privett.

Also, in one of the concluding questions that Mr. Privett propounded to you you referred to one of the documents, and I believe you have it in mind, in which you read a note which you said was in your handwriting to the effect, as I wrote it down, that title passed to trustee. Do you recall that?

A Yes.

Q And by that reference was it your assumption at that time that the actual title to the corpus—that would be the shares of stock that is described in the trust indenture—had passed to the trustee?

A That was my impression at the time.

BY MR. YOUNG:

Q That was your impression at that time, is that right?

A Right.

Q And if such title had not passed, then, what would your answer be as to the question of the validity of the trust?

A I would have considered it an invalid—invalid as a trust and that it belonged in the residue of the estate.

Q Yes. Well, that is the way I understood your testimony.

* * * * *

BY MR. PRIVETT:

Q But in response to some hypothetical question that Mr. Young put to you, he asked you what if the stock certificates had at one time, in whatever time he said, had at one time been back in the possession or back in the hands of Mr. Irvine, what difference would that have made to you?

A Well, it would have indicated that he retained not merely rights of income but rights over the corpus and would have weakened the trust theory and strengthened the custodianship theory, in my opinion.

* * * * *

REDIRECT EXAMINATION

BY MR. YOUNG:

Q I understood, Mr. O'Connor, that when I stated the hypothetical question about the 505 shares of Irvine stock having been in the possession and under the control, both, in the possession of and under the control of Mr. Irvine, that your answer to that question was then, if you had known that, you would have stated or held that the Indenture of Trust was only a paper trust and that it was invalid. Am I correct or incorrect?

A I don't so recall my testimony. I think my testimony was this, that that would be a strong factor for me to consider indicating that it was not a trust but a mere agency or something else.

Q And a paper trust, didn't you—

A Yes.

Q —use that word?

A Paper trust.

Q Just a paper trust.

A That here on this piece of paper it is given the appearance of a trust when it was never intended to be.

Q That's right. That's what I understood your answer was.

A That if those facts were so and shown to me, that that is the conclusion I quite possibly would have reached.

MR. YOUNG: Yes. That is all." (Tr. 2740, 2741-2743, incl.)

Testimony of Robert H. Gerdes.

"Q Your information about The Foundation and its property holdings were given to you by Mr. James Irvine?

A Well, by Mr. Irvine, and I also became acquainted with his son, Myford, and we became friends and we also talked about their affairs.

Q When did you first become a member of the board of directors of The Foundation and a member of The Foundation?

A I believe it was 1944.

Q Do you recall who you replaced on the board of directors?

A I think it was Mr. William Spaulding, who had, prior to that time, acted as his personal attorney on certain matters.

Q Had Mr. Spaulding also been with the P,G&E legal department for a period of time?

A Yes, he had. Prior to that he was associated with Mr. Chaffee Hall." (Tr. 1808-1809)

* * * * *

"Q Prior to the time that you went on the board of directors of The Foundation did you have any discussion with Mr. Irvine about that appointment?

A Yes. He asked me if I would be willing to serve as a director, a member and director, of The Irvine

Foundation. Prior to that time he told me that he wanted to become interested in the affairs, in his affairs, the affairs of The Irvine Company and The Foundation, and he asked me if I would be willing to serve, and at that same time he explained to me again what his general intents were with regard to the creation of The Foundation.

Q In substance, what did he tell you about what his intents were with respect to The Foundation?

A Well, he said that he thought he had been quite generous with members of his family and that he wanted to create a charitable trust for the benefit of worthy and needy people in the state and he felt that the state had been very good to him in that he had accumulated considerable property and wealth and he wanted to return some of this.

He also said that he thought it was important to have the control, or at least the majority of the members of The Foundation, which owned a majority of the stock of The Irvine Company, he wanted a majority of those directors to be men outside the family, who had had business experience, and he said that he had observed that other families that had accumulated considerable wealth frequently had extensive litigation and that it often tied up the operations of their properties; and so he thought it very important that they have outside individuals who could exercise their independent judgment and who would judge matters dispassionately as far as the family was concerned; and for that reason he said that he would like me to serve.

Q You then accepted an appointment as a member and director of The James Irvine Foundation?

A I did.

Q And you continued from that time forward until this as a member and director of that corporation?

A I have.

Q Did you prepare Mr. Irvine's will?

A Yes.

Q I show you a copy of the document that has been marked for identification as Defendants' Exhibit B, and I will ask you if you can identify this copy as the document to which reference has been made.

A Well, it lookes like the will that was admitted to probate, without comparing every page.

Q What was the date of execution of thw will, Mr. Gerdes?

A May 14, 1946.

Q Approximately how long was this will in the course of preparation between you and Mr. Irvine?

A I have no definite recollection, but I have—my impression is that it was a matter of a few weeks where he was giving me information and I would give him a draft and he would look at it and make suggestions.

Q In connection with the preparation of the will, did you discuss with Mr. Irvine his various property affairs as of that time?

A Yes, he discussed some of them with me.

Q Did he discuss specifically with you anything to do with stock of The Irvine Company?

A Yes. He said that he had given his son Myford —which of course I knew by that time—200 shares; that he had given, that 200 additional shares were given in trust for his son then deceased, James Irvine, which was under a trust; that he had given 50 shares, as I recall it, to Kate Wheeler, and 40 shares too, as I recall it, under a trust created for the benefit of his then wife." (Tr. 1810)

* * * * *

"Q. Did he tell you that one of the purposes he had in mind in organizing the Foundation was to avoid the payment of large estate back taxes after he died?

A He told me that if he died and still had owned the stock, he didn't know that it would be valued for and it could result in the entire necessity of selling the entire property.

Q In order to pay his estate tax return—I mean the estate tax that was due?

A The estate and inheritance tax.

Q The inheritance tax, federal and of California, both. And he told you on that occasion that that was one of the prime reasons he set up The Foundation, isn't that right?

A He said it was one of them. I don't believe he used 'prime,' but that was one of them." (Tr. 1941)

* * * * *

Testimony of N. Loyall McLaren.

"Q When did you discuss with Mr. Irvine the first time anything about a foundation?

A Sometime in the year 1935.

Q Where did that discussion take place?

A It took place in his office.

Q In San Franciso?

A In San Francisco." (Tr. 268)

* * * * *

"Q Good. Tell us about it. You started out with one phase. Tell us that phase first, and what you said, what he said, and tell it to me.

A I have covered two aspects. One was the preservation of his life's work as a monument, as he expressed it at that time. The second was the charitable

features, which would also perpetuate his memory through the foundation bearing his name.

The third was the protection of his estate from ruinous taxation which might result if at the time of his death the entire ranch were owned by The Irvine Company.

I remember talking to him about the case of the estate of Harry Teviss, who had been a large landholder in Kern County Land Company, and pointing out the basis of the taxation of the Kern County Land Company stock in the Teviss estate on the basis of market value of acreage based on small sales in the neighborhood, and compared with earning power, and pointed out how ruinous the result of that treatment had been to the Harry Teviss estate. I pointed out that if he divested himself of his Irvine Company stock that problem would be completely removed, and he mentioned in that connection that he had already made rather adequate provision for his heirs.

Those were some of the points discussed. We also discussed in a very limited way the type of charities that it might be worthwhile for him to consider as beneficiaries of funds from the foundation.

Those were I think the principal items. I may have overlooked one or two, but those were the principal ones.

Q Well, the question of the taxes was the important item, I take it then, isn't that right?

A The question of the taxes?

Q Yes.

A No.

Q Against the estate.

A No, that was not the most significant item.

Q Well, I understood you to refer to the Teviss estate and the large taxes that had to be paid there.

A I did, I did. That was one of the elements that I thought he ought to take into consideration.

Q Yes. Well, he was interested in that phase of your presentation, wasn't he?

A He was human, yes.

Q The taxes, I mean.

A Yes. He was human.

Q Yes.

A Yes.

Q And you were his tax advisor.

A Yes.

Q Is that right?

A Yes.

Q Did he also mention his family, his family had been well provided for?

A That's right.

Q Through other trusts and stockholdings in the ranch?

A I can't remember the details, except in general it summed up to the fact that the members of his immediate family were well provided for.

Q Well, did you know anything about that yourself personally?

A Let's see. 1936? I can't recall at that time how much I knew about the affairs of the family. I knew about his antenuptial agreement. By that time I knew, certainly knew, about the 200 shares of stock that he had given in trust to his son, I knew about the 200 shares that he had given outright to his other son, I knew of the trust that he had created for his granddaughter, I knew quite a bit about it, but I can't remember the details at present.

Q You I believe also were a trustee under a trust created for his granddaughter, Mrs. Wheeler?

A That came at a later date, yes.

Q Yes, and that involved 50 shares of Irvine Company stock?

A No, that involved some San Francisco real estate.

Q And some stock too?

A No, those were separate transactions.

Q I see. All right. Did he tell you on that occasion that he feared that his heirs might clash over the vast amounts of money and land which he would leave behind?

A Well, that is a—sounds like a press agent's blow-up. He did—

Q I am reading from your interveiw in the Los Angeles Times.

A Yes. Well, I was not quoted verbatim in the Los Angeles Times, I assure you.

Q Well, I am reading from the exhibits attached to your answer in this case, so—

A Yes, that was—let me make it clear, that there was never any prepared statement given to the Los Angeles Times. There was a personal interview, and I never saw the article before it was printed. That is not the words that I used to the reporter.

Q Did you see the article before it was attached as Exhibit C to your answer?

A I did. Certainly, I am familiar with the article.

Q The answer to the amended complaint in this case?

A I am familiar with the article.

Q Well, did he say anything to you about that matter at all?

A He expressed some concern that because of the differences that had developed among various branches of the family, that if steps were not taken to insure if possible the holding intact or intact as far as possible, of the major assets, major producing assets, of The Irvine Company, that the result might well be that the heirs would not continue to operate the ranch as a unit, and that in that way the results of his life's work would be destroyed sooner or later.

Q Well, did you have any discussion—

A Those were not his exact words. That in general is the impression I got from what he said." (Tr. 290-295, incl.)

In re Sutro's Estate, 155 Cal. 72; 102 P.920, the Court Stated.

". . . This action was begun and brought to trial and judgment before the will was admitted to probate. The defendants as trustees set up the provisions of the will in opposition to the complaint. Judgment was rendered in favor of plaintiff, declaring the plaintiffs owners in fee of a two-thirds interest in the property, and that the trust attempted to be created by the will of Adolph Sutro was void, because, as the conclusions of law declare, the fund "was not intended wholly for charitable purposes, but was intended for purposes partly charitable and partly other than charitable, and that the purposes for which it was intended are vague and uncertain, and cannot be made certain." No appeal was ever taken from this judgment, and it has become final. It was entered on June 19, 1899.

* * * * *

". . . The fatal objection of the validity of the trust is that it authorizes the funds to be devoted to purposes other than charitable, and that it leaves the question whether it is to be devoted to charitable purposes, or to other uses not charitable, entirely in the discretion of the executors, or, in case of their default, in the discretion of the board of trustees. The Constitution declares that 'No perpetuities shall be allowed except for eleemosynary purposes.' Article 22, §9. The word 'eleemosynary' in this passage is synonymous with 'charitable,' as the latter word is used and understood in treatises and decisions upon the subject of trusts.

The rule upon this subject was stated in the decision of this court in Estate of Hinckley, 58 Cal. 509, in these words: 'Where a bequest is made for charitable purposes, and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void. If, for instance, a bequest is made for such charitable or other purposes as the trustees should think fit, the whole bequest will be void for uncertainty'—citing Tudor on Charitable Trusts, 223. This statement of the rule is well established by a long line of cases on the subject. In Mason v. Perry, 22 R. I. 475, 494, 48 Atl. 671, 678, the court says: 'It is well settled that, in order to create a valid charitable trust in perpetuity, the language employed must require the fund to be expended for charitable purposes only, and it must not be left in the discretion of the trustees to spend the money for a charitable or noncharitable purpose. In other words, the devotion of the fund to charity must be clear and certain.' In the case of In re Shattuck's Will, 193 N. Y. 446, 86 N. E. 455, decided by the New York Court of Appeals, the provision was that the trust funds

were to be 'paid over to religious, educational, or eleemosynary institutions' as the trustees should deem advisable. The court says: 'The word "educational" does not necessarily describe a public or charitable institution. * * * An 'institution' is an established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes. An institution is a mere organism for the accomplishment of an object, and the existence of such organism cannot, in the nature of things, make such object definite. The use of the word 'institution' does not point to a public, as distinguished from a private, organization, and there is nothing whatever in the will, except in the words 'religious,' 'educational,' and 'eleemosynary,' that points in the slightest degree to a charitable use. And after holding that under the will the trustee could devote the proceeds of the trust fund to purposes which would be in whole or in part private and individual, and not public and charitable, the court says: 'The possible devotion of the income of said trust in whole or in part to private use necessarily affects the entire gift, and requires that the same shall be held invalid.' In Chamberlain v. Stearns, 111 Mass. 268, Gray, J., quotes from the opinion of Sir William Grant in James v. Allen, 3 Meriv. 17, the following in regard to a trust of this character: 'If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute.' In Kendall v. Granger, 5 Beav. 300, the court say: 'It is not a question whether the trustees may apply it [the fund] to a charitable purpose, but whether, by the words of the will, they are bound to do so. The decisions go

to this further extent that they must have no option between a charitable and any other purpose.' Quotations could be multiplied indefinitely annuoncing this doctrine. It is thus summarized in 2 Perry on Trusts, §711: 'There are other cases where legacies are given in trust for purposes that are clearly charitable, but these purposes are joined with words that authorize the trustees to expend the fund for general purposes which are not charitable. If the fund is not apportioned by the donor, the trustees may expend the whole for one purpose or another which is not charitable, and at the same time execute the exact power given them under the will. In such cases the courts cannot establish and administer the trust as charitable.' "

In re Kline's Estate, 118 C.A.514; 32 P.2d 677, the Court Stated.

Respondent makes the suggestion that, since legacies and devises for charitable purposes "are the favorites of the courts, * * * the language should be liberally construed so as to create a valid trust if possible." Even though the fact be conceded that when, in the course of the operation of their proper functions in cases of this kind, in some scattered instances the courts may seem to have strained legal principles in decreeing the creation of charitable trusts, it cannot be accepted as a correct statement of a legal or equitable principle to say that in such situation the courts, as an institution, are required to show partiality in favor of litigants who would be benefited by such declaration. On reflection, it should be apparent that the courts can have no fixed policy which will admit of the operation of a principle by which one party to litigation will be favored to

the detriment of the other party therein. Manifestly, even-handed justice cannot be administered on the basis of partisanship, expressed or indicated, either of the parties to the litigation. Nor may the subject-matter in controversy in any manner affect the scales of justice. The business of the courts is to administer justice as nearly as may be in accordance with fixed rules of law and procedure, aided wherever and whenever proper and necessary by established and governing principles which relate to equity jurisprudence. Any intentional departure from such a course, no matter how worthy the objective, must result in reproach to the surest foundational support of our government. Hence, in the instant inquiry, however obvious it may be that what the testator himself had in mind was to dispose of certain of his property in a benevolent manner, even though it may have been "for the purpose of aiding and for the betterment of crippled children," his good intentions in the matter cannot be carried into effect by the creation of a charitable trust therein in the face of his plain language which permits his trustee to devote his estate, or some portion thereof, to purposes that are legally non-charitable. It may be that the testator probably thought that what he had in mind was to create that which in the law constituted a charitable trust; but the estate of the testator is bound by the specific and express directions contained in the testator's will, rather than by inconsistent references or "side remarks" interspersed therein. Taylor v. Keep, 2 Ill.App. 381; In re Sutro, 155 Cal. 730, 102 P. 920; In re Walkerly, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97; In re Vance, 118 Cal. App. 163, 4 P.(2d) 977.

In Estate of Doane, 190 Cal. 412, 415, 213 P. 53, 54, it is said: "The decedent having made an invalid provision in clear, unequivocal language, the courts are without power to alter that language to express what may have been in the testator's mind but was not attempted to be expressed by him, however beneficient such unexpressed intent may have been. 'It may be said of all wills, that the testator's intent is to make a valid disposition of his property. * * * But a court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court, had he known his own attempt was invalid.' Estate of Walkerly, supra, 108 Cal. 627, 659, 41 P. 772, 780, 49 Am. St. Rep. 97."

And again, in the Matter of Frasch's Will, 245 N. Y. 174, 156 N. E. 656, 658, where the bequest was carefully, "ear-marked," among other things, the court said: "So, too, a trust which may include social, educational or moral benefit, confined to members of a corporation and in which the general public has no direct participation, has been declared a trust for a private use. Attorney General v. Hewer, 2 Vern. 387; Carne v. Long, 2 De Gex. F. & J. 75; Miley v. Attorney General (1918) 1 Irish Rep. 455. In such cases since the use is not charitable even in a broad sense, an intent or purpose on the part of the creator of the trust to confer an indirect benefit upon the public does not change the character of the trust. Not even if the designated use might tend to create the contemplated public benefit would the rule be different. 'There is no authority for holding a charitable tendency to be a charitable use; in

other words, that a gift to a person for his own benefit, whereby consequential charity may arise, is not a charitable use.' "

As executed, the effect of the paragraph of the will to which attention hereinbefore has been directed is that the trustee therein named is permitted to disburse a portion of the income of the trust property to uses that in legal contemplation either are or may be noncharitable. Especially as applied to a noncharitable corporation, that such a provision in a will defeats its intended purpose is attested by so many authorities that to cite them would amount to a superfluity. However, as to general governing principles, see the cases hereinbefore cited; also Estate of Dol, 182 Cal. 159, 187 P. 428, which relates particularly to an attempt to create a charitable trust in favor of a noncharitable corporation.

From the foregoing it may be deduced that, in the opinion of this court, no legal trust was created.

In re Vance's Estate, 118 C.A.162; 4 P.2d 977, the Court Stated.

"Tested by the standard required for a private trust, the attempt of the testatrix fails to establish a trust, because of the uncertainty as to beneficiaries. Barker v. Hurley (1901) 132 Cal. 21, 63 P. 1071, 64 p. 480. Appellants do not question this conclusion, but rest their claim to the balance of the estate on the theory that a charitable trust was created. In such a trust, the persons constituting the beneficiaries need not be certain—indeed, should not be. Estate of Hinckley (1881) 58 Cal. 457; Collier v. Lindley (1928) 203 Cal. 641, 652, 266 P. 526. But, in order that a trust may be valid as a charitable trust, its objects must be

limited to those of a charitable nature. Estate of Sutro (1909) 155 Cal. 727, 102 P. 920, 922. Two short quotations in the Sutro Case express its thought. The first is from Estate of Hinckley, supra: 'Where a bequest is made for charitable purposes, and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void.' These words from the opinion in Kendall v. Graner, 5 Beav. 300, are also given: 'It is not a question whether the trustees may apply it (the fund) to a charitable purpose, but whether, by the words of the will, they are bound to do so. The decisions go to this further extent that they must have no option between a charitable and any other purpose.' "

In re Peabody's Estate, 21 C.A.2d 690; 70 P.2d 249, the Court Stated.

Appellants maintain that (1) paragraph 7 is valid because it can be construed to create a lawful private trust, and, (2) that it is valid because it can be construed to create a charitable trust. Each of these arguments refutes the other, because, generally, if the provisions of a will which attempt to create a trust are so uncertain that they may be construed to create either a private or a charitable trust it has been usually held that the purported trust failed because of uncertainty in the instrument which attempted to create it. In re Estate of Hinckley, 58 Cal. 457, at page 509, it is said: " 'Where a bequest is made for charitable purposes and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void. If, for instance, a bequest is made for such charitable, or other purposes, as the trustee should think fit, the whole bequest will be void for uncertainty.' (Tudor on Charitable

Trusts, 223.) It was said by counsel (arguendo) 'the principle of all the cases is, that the portion of the trust that might otherwise be construed as charitable, can not be sustained, because the trustees have an election apply the fund to purposes not technically charitable.' "

That the will fails to create a valid private trust is apparent from a reading of the trust provision. It violates the rule against perpetuities. Sections 715, 772, Civ. Code. In re Estate of Hinckley, supra. The beneficiary under the trust or the class from which it may be selected by the trustee, is not made certain in the instrument attempting to create it. Section 2221, Civ. Code. In Re Estate of Ralston, 1 Cal. (2) 724, 37 P. (2d) 76, 77, 96 A.L.R. 953, it is said: "It is essential to the validity of a trust, whether express or precatory, that the language employed definitely indicate an intention to create a trust, that the subject-matter thereof be certain, and that the object or persons intended to have the benefit thereof be certain. The authorities are legion to this effect. The 'trust' here involved is defective and invalid because of its complete failure to indicate either the object or the persons to benefit thereby."

If, however, the will created a valid charitable trust, an uncertainty as to the beneficiary is no ground for asserting its invalidity where, as here, the power is given to the trustee to nominate the recipient of the charity. In re Estate of Bartlett, 122 Cal.App. 375, 10 P.(2d) 126; In re Estate of Bailey (Cal.App.) 65 P.(2) 102; In re Estate of Hinckley, supra.

Under paragraph 7 of the will it would seem clear that the trustee could nominate as the beneficiary

of the trust "an institution for old people" that was either charitable in its purposes or was organized for profit. The will contains no limitation on the power of selection by the trustee that would require him to select a charitable institution as beneficiary.

The use of the word "institution" by the testatrix is of no particular significance here. In re Estate of Sutro, 155 Cal. 727, 102 P. 920, 922, the Supreme Court in quoting from In re Shattuck's Will, 193 N.Y. 446, 86 N.E. 455, and in commenting on that case, said: " 'An "institution" is an established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes. An institution is a mere organism for the accomplishment of an object, and the existence of such organism cannot, in the nature of things, make such object definite. The use of the word "institution" does not point to a public, as distinguished from a private, organization, and there is nothing whatever in the will, except in the words "religious," "educational," and "eleemosynary," that points in the slightest degree to a charitable use.' And after holding that under the will the trustee could devote the proceeds of the trust fund to purposes which would be in whole or in part private and individual, and not public and charitable, the court says: 'The possible devotion of the income of said trust in whole or in part to private use necessarily affects the entire gift, and requires that the same be held invalid.' "

It is well known that there are many charitable institutions that are organized and exist solely for the purpose of caring for needy old people. It is equally well known that there are other such institutions or-

ganized and conducted for private profit. Both classes may be composed of deserving institutions in that they provide repose and care for the aged. The deceased used no appropriate language in her will to designate either of these classes. We cannot rewrite her will. We must construe it as she wrote it. The conclusion that the testatrix had in mind either a charitable institution or one organized for private profit wold be based on conjecture and not on anything written in the will. In order to avoid intestacy, either partial or complete, we are not permitted to place on the will any construction not expressed in it and which is based on supposition as to the intention of the testatrix in the disposition of her estate. In re Estate of Hoytema, 180 Cal. 430, 181 P. 645.

A similar situation was before the court in Re Estate of Sutro, supra. Under the trust attempted to be created in the will there under consideration, the beneficiaries of the trust could be either charitable or other than charitable. The Supreme Court there concluded that: "Without violating the directions of the will the entire fund could be devoted to institutions of learning and science carried on for private gain, of which there are many, or to the encouragement of abstract scientific discoveries not tending to benefit mankind, or to reward inventions calculated to profit the inventor alone, or those to whom he should transfer his secret or patent. The trustees could apply a part to each of the different objects, or they could apply the whole of it to one of them to the exclusion of any other. These objects not being exclusively or necessarily charitable, it follows, under the rule stated, that the entire trust was invalid."

We consider this holding conclusive here. The case of In re Estate of Kline, 138 Cal. App. 514, 32 P.(2d) 677, is to the same effect.

In Goetz v. Old Nat. Bk. of Martinsburg, 84 S.E.2d 759, the Court Stated.

"Going further into the question of charitable trusts other than religious trusts, clearly it was the intention of the testatrix to create a charitable trust in part. But the language used in attempting to do so is so general and indefinite that the executors and trustees may use part of the property in establishing a charitable trust. Likewise, such trustees, under the wide and uncontrolled discretion accorded them, may create a private trust. Therefore, the trust created by the testatrix would be 'mixed'. In re Durbrow's Estate, 245 N.Y. 469, 157 N.E. 747. The purpose of a trust and duties of a trustee must be clearly defined. Massanetta Springs, etc., Encampment v. Keezell, 161 Va. 532, 171 S.E. 511."

* * * * *

"In this state of the record, we think that a trust for profit as well as a charitable trust is created by the fourth clause of the will. 51 Harvard Law Review, 562. Such mixed trust cannot be sustained. 2A Bogert on Trusts, pages 81, 82; 2 Restatement of the Law, Trusts, § 376;"

* * * * *

"The trust is for mixed purposes, and though the will of the testatrix be considered as partially providing for a charitable trust, there is no method of apportionment as between the charitable purposes and the scientific and other trust for profitable purposes mentioned

by testatrix. Tilden v. Green, 130 N.Y. 29, 28 N.E. 880, 14 L.R.A. 33; Wheelock v. American Tract Co., 109 Mich. 141, 66 N.W. 955, 63 Am.St.Rep. 578; Mitchell v. Reeves, 123 Conn. 549, 196 A. 785, 115 A.L.R. 1114."

* * * * *

The rule against perpetuities has been defined as follows: "The rule against perpetuities is not a rule of construction but is an arbitrary, absolute and fundamental canon to prevent indefinite control by a grantor or testator over the devolution of property. * * * requires that 'every executory limitation, in order to be valid, shall be so limited that it must necessarily vest, if at all, within a life or lives in being, ten months and twenty-one years thereafter, the period of gestation being allowed only in those cases in which it is a factor.'" Pts. 4 and 5, syllabus, Brookover v. Grimm, supra [118 W.Va. 227, 190 S.E. 697]; Whelan v. Reilly, 3 W.Va. 597; Smith v. United States Nat. Bank of Denver, 120 Colo. 167, 207 P.2d 1194.

The foregoing statement of the rule against perpetuities clearly applies to human beings. In the instant case, we are dealing with two executors who are artificial beings and also unidentifiable beneficiaries or ultimate takers of the property. In that situation, it may be that the element of life or lives in being and the period of gestation may not be factors in applying the rule. Nevertheless, we apply the rule against perpetuities as stated in Brookover v. Grimm, supra, giving consideration to the element of life or lives in being and the period of gestation. As so applied, the rule would prevent the vesting of the property in the ultimate beneficiaries for the reason that the trustees have an un-

controlled discretion and no time is fixed in the will for them to finally dispose of the property bequeathed by the testatrix.

The rule against perpetuities does not apply to charitable uses. Pace v. Dukes, 205 Ga. 835, 55 S.E.2d 367; Hulet v. Crawfordsville Trust Co., 117 Ind.App. 125, 69 N.E.2d 823; Miller v. Flowers, 158 Fla. 51, 27 So.2d 667; In re Wright's Estate, 284 Pa. 334, 131 A. 188.

The trust here considered, having in mind the unlimited discretion of the trustees, may possibly be converted into a charitable as well as a noncharitable trust. The execution of such trust is barred by the rule against perpetuities. In re Kline's Estate, 138 Cal.App. 514, 32 P.2d 677.

In Grigson v. Harding, 144 A.R.2d 870, the Court Stated.

" 'The discretion of the trustees must, in any event, be limited to a distribution for charitable purposes. If, in his discretion, it may include noncharitable purposes, the gift is not charitable." Page on Wills, supra, page 593. The beneficiaries of a private trust must be definitely asertained at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities. "* * * it has been held in England and quite generally in the United States that where property is left in trust for purposes which are not limited to charity, although they may be broad enough to include charity, the intended trust fails altogether." Scott on Trusts, Vol IV, Page 2820, Sec. 398.2.

In Green v. Allen, 132 Me. 256, 170 A. 504, 505, an estate was left to four named persons "to be distributed

by them in accordance with their wishes and desires. Inasmuch as (A—one of the four) is familiar with my wishes to a considerable extent, his suggestions may be helpful in the distribution." Because of uncertainty and indefiniteness, the property passed by resulting trust.

"The purposes for which such bequest can be used must be charitable only. If the intention of the testator was that the gift could be used for other than charitable uses, it is fatal to the validity of the bequest. If a part may be so otherwise used, all of it may be." Bates v. Schillinger, 128 Me. 14, 20, 145 A. 395, 398.

"A trust which by its terms may be applied to objects which are not charitable, in the legal sense, and to persons not defined by name or by class, is too indefinite to be carried out." Murdock v. Bridges, 91 Me. 124, 133, 39 A. 475, 478.

In Olliffe v. Wells, 130 Mass. 221, the gift was to the trustee "to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him." Here again the trust failed for indefiniteness and uncertainty.

In Smith v. Heyward, 115 S.C. 145, 105 S.E. 275, provision was made for keeping up the homestead, house and garden where was located also the family tomb. The court pointed out that there was no charitable purpose because there was no public benefit. It was held that the trust must fail as being too vague and indefinite and as violative of the rule against perpetuities.

The provisions of the will, thus interpreted, fall into the category illustrated by the Restatement of

the Law of Trusts, supra, page 1291, Sec. 417(b): "1. A bequeaths $10,000 to B in trust to dispose of it to such objects of benevolence and liberality, charitable or otherwise, as B in his discretion shall most approve of. B holds the money upon a resulting trust for the next of kin of A * * *." The controlling rule of law is set forth by the Restatement at page 1200, Sec. 398, Comment on Subsection (1) in these words: "If property is transferred to a person upon an intended trust for indefinite or general purposes, which include *but are not limited to* charitable purposes, and there is no definite or definitely ascertainable beneficiary designated, the intended trust fails." (Emphasis supplied.) In re Peabody's Estate, 1937, 21 Cal.App.2d 690, 70 P.2d 249, at page 250, the court said: "The will contains no limitation on the power of selection by the trustee that would require him to select a charitable institution as beneficiary. * * * We cannot rewrite her will. We must construe it as she wrote it. The conclusion that the testatrix had in mind either a charitable institution or one organized for private profit would be based on conjecture and not on anything written in the will. In order to avoid intestacy, either partial or complete, we are not permitted to place on the will any construction not expressed in it and which is based on supposition as to the intention of the testatrix in the disposition of her estate." Cases decided upon the same principles of law are Matter of Shattuck's Will, 1908, 193 N.Y. 446, 86 N.E. 455; Estate of Sutro, 1909, 155 Cal. 727, 102 P. 920; Nichols v. Allen, 1881, 130 Mass. 211; Wilcox v Attorney General, 1910, 207 Mass. 198, 93 N.E. 599. The applicable law inexorably compels us to declare a resulting trust to the next of kin.' "

Scott on Trusts, Sec. 398.2, p. 3079.

(4) *Whole disposition fails.* On the other hand, it has been held in many cases that where property is bequeathed in trust for charitable purposes and other purposes for which a trust cannot be validly created, the trust fails altogether. In these cases the court has found it to be impossible or impracticable or contrary to the intention of the testator to uphold the trust, either in whole or in part, as a charitable trust.

As we have seen in the preceding section, it has been held in England and quite generally in the United States that where property is left in trust for purposes which are not limited to charity, although they may be broad enough to include charity, the intended trust fails altogether. In a few of these cases it has been argued that a pro rata division should be made between charitable and noncharitable objects, and that the trust should be upheld in part. The courts have held, however, that the method of making a pro rata division of the property among the valid and invalid objects is not applicable where the testator has not enumerated several objects but has merely grouped together in general language objects which are charitable and objects which are not charitable. Where the testator has used several adjectives or nouns, of which some connote charity and others do not, the court will not direct a division of the property into as many shares as there are adjectives or nouns. The question of such an apportionment was raised in *Morice v. Bishop of Durham.* In that case the testatrix left the residue of her estate to such objects of "benevolence and liberality" as the legatee should most approve of. The Attorney-General con-

tended that although the word "liberality" did not connote charity, the word "benevolence" did, and that the court should divide the fund into two equal parts and uphold the trust as to one half of the estate. Lord Eldon held, however, that even assuming that the word "benevolence" connoted charity, no apportionment should be made. In a later English case a testator bequeathed one fifth of his residuary estate in trust "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they think proper." The court held that the trust failed, since "patriotic" purposes are not necessarily charitable. Lord Sterndale, M.R., said: "Then the third and last resort was that, at any rate, assuming patriotic purposes and objects to be outside the definition of charity, and therefore bad in law, the fund can be divided between patriotic objects which are not charitable, and patriotic objects which are charitable. I do not see how that can be done. There is no distribution at all between the different objects. The trustees are to apply the fund either to one or to the other, or to one and the other in quite undefined proportions, and it is therefore open to them, on the wording of the will, to apply the whole of the fund to purposes which are not charitable, and have nothing left for charity, and, in those circumstances, it seems to me an apportionment such as is suggested, whether in equal or in other proportions, is impossible."

In Lawson v. Lowengart, 59 Cal. Rptr. 186, the Court Stated.

"The actual or symbolic delivery of the securities was essential to complete the inter vivos trust. A delivery by instrument must have the intended effect of divesting the donor of all present control and vesting the trustees with an equitable present right to reduce the fund into possession (Beebe v. Coffin, 153 Cal. 174, 177-178, 94 P. 766). A delivery may be symbolic, such as delivery of a written instrument, without physical delivery of the securities themselves, so long as the instrument is one upon which delivery of the trust corpus might be compelled (Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947; Edwards v. Guaranty Trust etc. Bank, 7 Cal.App. 86, 89, 190 P. 57).

The mere signing of the instrument by Dr. Maxwell did not constitute delivery nor create a presumption thereof (Boyd v. Slayback, 63 Cal. 493; Miller v. Jansen, supra). As to Dr. Maxwell's concern with the execution and completion of the inter vivos trust at the time of signing, the record is in sharp conflict, as indicated above. The court could reasonably infer that she had no intention that the trust become effective unless and until the Los Altos home and the Lawson securities were included. There is no testimony that she ever directed Mr. Cotton to deliver the instrument to any of the trustees nor that she gave him any irrevocable directions to so deliver it. As Mr. Cotton was then her attorney, the court could justifiably find, under the circumstances of this case, that his possession constituted her possession and that she retained control. Possession by the grantor has been held to raise a presumption of nondelivery (Tweedale v. Barnett, 172 Cal. 271, 156 P.

483; Lample v. McDougall, 103 Cal.App. 799, 285 P. 328).

The fact that Dr. Maxwell handed the instrument to Mr. Cotton after signing it, did not of itself constitute a delivery to him or authorize him to deliver the instrument to the trustees. The mere handing of an instrument to a third party does not comprise delivery or authorize that person to deliver the same to the assignee unless there are express and definite instructions to that effect and unless such directions are irrevocable and the instrument is placed beyond the assignor's power of control or recall (Jeannerette v. Taylor, 2 Cal.App. 2d 568 at p. 570, 38 P.2d 831; Estate of McConkey, 33 Cal.App.2d 554 at pp. 560-561, 92 P. 2d 456; Bank of America v. Frost, 205 Cal.App.2d 614, 23 Cal.Rptr. 441; Kunde v. Kunde, 122 Cal.App.2d 624, 266 P.2d 608).

Here, while the instrument was in fact given to the trustees by Mr. Cotton, there was no expressed intention by Dr. Maxwell that the instrument was to be so delivered. It was the duty of the trial court to weigh the conflicting evidence concerning Mr. Cotton's authority and the inferences to be drawn from the facts of his employment (Gagnon Co., Inc. v. Nevada Desert Inn, 45 Cal.2d 448, 459, 289 P.2d 466; Sullivan v. Dunne, 198 Cal. 183, 244 P. 343). As there was ample evidence that he was not authorized to deliver the agreement to the trustees, the fact that he did so and caused them to sign it is of no legal significance (Rothney v. Rothney, 41 Cal.App.2d 566, 570, 107 P.2d 294).

If Dr. Maxwell had no intention of divesting herself of control at the time, the handing of the instrument to Mr. Cotton and his manumission of

the instrument to the trustees would not constitute a constructive or symbolic delivery sufficient to establish the trust. The delivery or absence of delivery to the trustees by way of the trust agreement was a question of fact to be determined by the trial court (Blackburn v. Drake, 211 Cal.App.2d 806, 27 Cal.Rptr. 651). We have concluded upon a consideration of the entire record that the court's finding that Dr. Maxwell never intended or effected delivery was sufficiently supported by the evidence (cf. Pollard v. Pollard, 166 Cal.App.2d 698 at pp. 702-703, 333 P.2d 356).

As our conclusion as to the sufficiency of the evidence to sustain the judgment on either of the first two issues raised disposes of the appeal, we need not discuss the parties' contentions concerning the prerequisites for the transfer of the trust corpus."

In Obranovich v. Stiller, 220 C.A.2d 205; 34 Cal. Rptr. 923, the Court Stated.

The well settled rule is succinctly stated by Mr. Justice Peters in Henneberry v. Henneberry (1958) 164 Cal.App.2d 125, 129, 330 P.2d 250, 252: "In addition to physical delivery, and an acceptance by the grantee, to constitute a valid delivery there must exist a mutual intention on the part of the parties, and particularly on the part of the grantor, to pass title to the property immediately. In other words, to be a valid delivery, the instrument must be meant by the grantor to be presently operative as a deed, that is, there must be the intent on the part of the grantor to divest himself presently of the title. Even if the document is manually delivered, but the evidence shows that the parties or the grantor intended the document to become operative

only upon death, the document is testamentary in character and void as a deed.

'In determining this fundamental issue of intent, various presumptions and inferences arise in favor of the validity of the delivery because of due execution, manual transfer, possession of the document by the grantee, its acknowledgment and recordation. But these presumptions and inferences are all rebuttable. Declarations and acts of the grantor before and after the alleged delivery, and of the grantee afterwards, are admissible on this issue. Fundamentally, the question of intent is one of fact to be determined by the trier of the facts on all the evidence.'

As we said in Blackburn v. Drake (1963) 211 Cal.App. 2d 806, 811, 27 Cal. Rptr. 651, 654, 'Delivery or absence of delivery is a question of fact to be determined by the trial court. * * * A deed delivered with the intent that it shall take effect only on the death of the grantor is an attempted testamentary disposition and therefore void.'

In Blackburn v. Drake, supra, 211 Cal.App.2d pages 812-813, 27 Cal.Rptr. pages 655-656, Mr. Justice Molinari pointed out that there has been some confusion in the authorities in this state as to whether the possession of a deed raises a presumption or inference of delivery due to a difference in interpretation of section 1055, Civil Code, which provides that 'A grant duly executed is presumed to have been delivered at its date.' He then refers to the cases holding each way respectively, and concludes that the question has been settled by the decision in Miller v. Jansen, 21 Cal.2d 473, 477, 132 P.2d 801, which holds that possession of a deed by the grantee raises an inference of delivery. But, says

he, 'Whatever the niceties of the law be as between a presumption and an inference insofar as the kind or amount of evidence necessary to dispel such presumption or inference, it is settled law that the inference of delivery are rebuttable and in the face of contrary evidence become considerations of fact for the trial court or jury to determine. [Citations.] * * * Whether there was a delivery involved a disputed question of fact which was the function of the trial judge to determine from the facts and circumstances in evidence, it being within his province to pass upon the credibility of the witnesses, to weigh their testimony, and draw therefrom his inferences.' (211 Cal.App.2d p. 813, 27 Cal.Rptr. p. 655) Defendant contends that where the word 'delivery' is used in the authorities it means the manual transmission of the deed, whereas the 'delivery' the authorities are talking about and the one with which we are concerned means delivery with intent to vest in the grantee immediate title to the property described in the deed. (See the quotation hereinbefore set forth from Henneberry, supra, 164 Cal.App.2d page 129, 330 P.2d page 252.)

* * * * *

"Because of the inference arising from possession of the deed by the grantee, a prima facie case of a valid delivery was established by the evidence in this case that Mrs. Palm executed the deed and handed it to defendant, and that the deed remained in defendant's possession thereafter. Thus, we are confronted with the question whether there are circumstances or other contradicting evidence which overcomes the inference of delivery and any evidence supporting delivery. . . .

In contradiction of this evidence and supporting the court's finding that the transfer of title was not intended to occur until Mrs. Palm's death is the following: Defendant did not collect any of the rents from the property, nor did he pay any taxes on the property. Mrs. Palm collected all the rents, paid the taxes and arranged and paid for the insurance. All that he did with respect to the property was to do some repair work when Mrs. Palm requested him to do so. Mrs. Palm continued to live in an apartment on the premises. Defendant did not file a gift tax return in 1952 after receiving the deed. Mrs. Palm never accounted to defendant for the rents. He did not declare any revenue from the property or expenses or depreciation on the property in his income tax returns. Defendant testified that he knew that his sister was reporting in her income tax return the rentals received by her from the property. In a letter written to Mr. and Mrs. Michael, after the date of the delivery of the deed, Mrs. Palm stated that the property 'will be' defendant's, which statement is not consistent with her having already passed title to defendant.

'The retaining of possession of the property by plaintiff and the exercising of acts of proprietorship over it by her are evidence of ownership and a lack of delivery of the deed.' (Labadie v. Labadie (1943) 57 Cal.App.2d 456, 464, 134 P.2d 858, 861.) 'Exercise of dominion over property after the execution of a deed is incompatible with delivery and inconsistent with divestiture of title. [Citations.] While such dominion does not negate delivery as a matter of law, its incompatibility with delivery renders it a circumstance to be considered by the trier of fact on the question of de-

livery or nondelivery, particularly when coupled, as here, with the circumstance of nonexercise of dominion by the grantees.' (Blackburn, supra, 211 Cal.App.2d p. 818, 27 Cal.Rptr. p. 658.)

It seems strange that his sister would hand him a deed to transfer immediate title without discussion as to what her relationship to the property was to be thereafter. Defendant testified that no witnesses were present when the deed was given him. His failure to disclose what was said, coupled with his not recording the deed until after her death, plus her complete control and management of the property, strongly indicate that it was intended not only by Mrs. Palm, but by defendant as well (although it is Mrs. Palm's intent with which we are primarily concerned (Blackburn, supra, 211 Cal.App.2d p. 811, 27 Cal.Rptr. p. 654)) that the deed was only to have a testamentary effect."

In Blackburn v. Drake, et al., 211 C.A.2d 806; 27 Cal.Rptr. 651, the Court Stated.

" 'Delivery or absence of delivery is a question of fact to be determined by the trial court (Condencia v. Nelson, 187 Cal.App.2d 300, 302, 9 Cal. Rptr. 759; Chaffee v. Sorensen, 107 Cal.App.2d 284, 288, 236 P.2d 851.) Intent to pass title is an essential element of delivery and the question of intent is a question of fact to be determined by the trial court or jury upon all the circumstances surrounding the transaction. (Jones v. Jones, 183 Cal.App.2d 468, 472, 6 Cal.Rptr. 819; Williams v. Kidd, 170 Cal. 631, 638, 151 P. 1; Priest v. Bell, 123 Cal.App.2d 528, 531, 267 P.2d 49; Donahue v. Sweeney, 171 Cal. 388, 153 P. 708.) The important intention is that of the grantor and not that

of the grantee. (Huth v. Katz, 30 Cal.2d 605, 608, 184 P.2d 521; 15 Cal.Jur.2d § 84, p. 481.) A deed delivered with the intent that it shall take effect only on the death of the grantor is an attempted testamentary disposition and therefore void. (Williams v. Kidd, supra, 170 Cal. 631, 644, 151 P. 1.) The applicable rule is well-stated in Henneberry v. Henneberry, 164 Cal. App.2d 125, 330 P.2d 250: "In addition to physical delivery, and an acceptance by the grantee, to constitute a valid delivery there must exist a mutual intention on the part of the parties, and particularly on the part of the grantor, to pass title to the property immediately. In other words, to be a valid delivery, the instrument must be meant by the grantor to be presently operative as a deed, that is, there must be the intent on the part of the grantor to divest himself presently of the title. Even if the document is manually delivered, but the evidence shows that the parties or the grantor intended the document to become operative only upon death, the document is testamentary in character and void as a deed." (p. 129, 330 P.2d p. 252.)

* * * * *

"As to the fact of delivery, the appellants contend that there is no evidence dispelling the presumption claimed by them. The precise question at hand is whether there are circumstances or other contradicting evidence which dispel the inference of delivery. The respondent is not concerned with the effect of the inference of delivery, or the claimed presumption of delivery, but is content to rest his argument on the assertion that the evidence in support of the trial court's findings was overwhelming and convincing, and that any one of eight items of evidence alluded to would sup-

port the court's finding of nondelivery. We do not agree with the respondent that the evidence adduced by the respondent in sustaining his burden of proof as plaintiff, and its effect as evidence dispelling the inference of delivery, was overwhelming; nor are we in accord that each of the items of claimed evidence supports the lower court's findings. Upon a consideration of the entire record we are satisfied, however, that there is sufficient evidence to sustain the trial court's finding of nondelivery, and we shall, hereafter allude to the evidentiary items, the cumulative effect of which establishes such sufficiency. Whether there was a delivery involved a disputed question of fact which was the function of the trial judge to determine from the facts and circumstances in evidence, it being within his province to pass upon the credibility of the witnesses, to weigh their testimony, and draw therefrom his inferences.

From the evidence before us, the trial court could find that Mrs. Blackburn did not intend that the deed should be presently operative. This inference could be drawn from Mrs. Giesser's testimony that her mother "*just kiddingly* said, 'There it is. You can put me out now, if you want to' * * *." (Emphasis added.) Appellants' assertion that Mrs. Blackburn was not "kidding" when she told her daughter to record the deed creates, at best, a conflict in the evidence. While it is true that recordation is not essential to the validity of a deed and that the failure to record in and of itself does not vitiate delivery or the intent to make a present transfer (Belli v. Bonavia, supra, 167 Cal.App.2d 275, 280, 334 P.2d 196; Stewart v. Silva, supra, 192 Cal. 405, 410, 221 P. 191), the failure to record until after the

death of the grantor is a circumstance for the court to consider with the other circumstances surrounding the transaction in ascertaining whether the grantor intended the deed to be presently operative. (Estate of Galvin, supra, 114 Cal.App.2d p. 363, 250 P.2d p. 333; Priest v. Bell, supra, 123 Cal.App.2d 528, 531, 267 P.2d 49.)

* * * * *

We next consider the course of conduct wherein the decedent, after the execution of the deed and the alleged delivery thereof, continued to live on the premises, permitted her husband to pay all of the taxes from community property (his earnings) and to use the same funds to pay for insurance and various maintenance costs. . . . Under the present state of our decisional law, however, the exercise of acts of ownership or dominion by the grantor, as well as the absence of such acts on the part of the grantee, are evidentiary circumstances which are weighed by the trier of fact against the *inference* of delivery. As pointed out in Estate of Galvin, the acts of control by the grantor do not vitiate the title of the grantee *where there has been a delivery,* nor are they shown for the purpose of vitiating the deed. "They were circumstances which if standing alone might not evidence nondelivery, but which added to all the other circumstances in the case strongly show that there was no delivery." (114 Cal. App.2d p. 363, 250 P.2d p. 338.) Belli, which held there *was* a delivery under the facts of the case, reiterated the rule that the "[p]ayment of taxes and keeping up insurance by the grantor are consistent with the intent to pass title." (167 Cal.App.2d p. 280, 334 P.2d p. 199.) Belli does not hold that such circumstances

may not be considered in determining whether or not the grantor intended to pass title immediately. While Belli follows Stewart in holding that possession of the deed by the grantee raises a presumption of delivery, the essence of its holding is that the payment of taxes and insurance by the grantor and the other circumstances presented did not prevail against the presumption.

Exercise of dominion over property after the execution of a deed is incompatible with delivery and inconsistent with divestiture of title. (Condencia v. Nelson, supra, 187 Cal.App.2d 300, 303, 9 Cal.Rptr. 759; Owens v. Ring, 117 Cal.App.2d 672, 677, 256 P.2d 1040.) While such dominion does not negate delivery as a matter of law, its incompatibility with delivery renders it a circumstance to be considered by the trier of fact on the question of delivery or nondelivery, particularly when coupled, as here, with the circumstance of nonexercise of dominion by the grantees.' "

In Atlantic Nat. Bk. of Jacksonville v. St. Louis Union Tr. Co., 211 S.W. 2d 2, the Court Stated as Follows.

"The indenture further provided that, 'from and after my decease, this conveyance remaining unaltered or unrevoked', the named trustees 'shall forthwith take, hold, manage and control' Clark's assets, make payment of the ten specified gifts or bequests and administer the purported trust as therein provided. All that was accordingly done. After Clark's death the trustees collected and took physical possession of all of Clark's property, paid his funeral expenses, the expenses of his last illness, his premortuary debts, and the ten special

gifts or bequests, and proceeded generally as though they were executors and trustees under a trust created by will.

The plaintiff bank contends, (1) that the indenture was absolutely void for all purposes, and created no trust whatever because it conveyed neither legal or equitable title to Clark's property in praesenti, (2) that there was no delivery of the property nor any possession thereof by the trustees until after Clark's death, (3) that since the indenture was not executed in accordance with the statute of wills it was at most a mere abortive and ineffectual testamentary disposition, (4) that the indenture being void, attacked thereon by plaintiffs is not barred by estoppel, nor by limitation, and (5) that at Clark's death his property descended to his heirs and the present corpus should now be awarded to plaintiff bank as Snyder's executor. The individual plaintiffs likewise contend the indenture is void.

The defendant contends, (1) the indenture created a valid express trust inter vivos, (2) that because Snyder accepted and executed the purported trust for 44 years, his executor is estopped to attack its validity, and the claim of plaintiff bank is barred by limitations.

Other points are raised and argued in the briefs but in the view we take of the case it is unnecessary to either state or discuss them.

As conceded by all the parties, the indenture cannot be held valid as a will, it not having been executed in accordance with the statute of wills. Nor can the indenture be given any effect as a mere deed inter vivos. It is unquestionably testamentary in character, was intended to be operative only in futuro and there was no delivery of the subject matter. Professor Scott,

in 43 Harvard Law Review, 521, 522, in his discussion of 'Trusts and the Statute of Wills' states: 'If the owner of securities or other personal property intends to make a gift of them but the gift is incomplete for lack of delivery, the donee takes nothing; and if the gift was intended to be upon trust for a third person, no trust arises'. See also In re Franz Estate, 344 Mo. 510, 127 S.W.2d 401, Allen-West Commission Co. v. Grumbles, 8 Cir., 129 F. 287, 290.

But whether a completed express trust is sought to be established by parol or by a written instrument, the evidence relied upon to establish it must be clear and convincing and so full and demonstrative as to remove from the mind of the chancellor any reasonable doubt with respect thereto. Harding v. St. Louis Union Trust Co., supra, Northrip v. Burge, supra, Eschen v. Steers, supra, United States v. Certain Land. etc., D.C. 70 F.Supp. 730.

While here there was no delivery to the trustees, during Clark's lifetime, of possession of any of Clark's property, defendant contends that notwithstanding there was no physical delivery the indenture itself so sufficiently transferred present title as to satisfy the demands of the law. This calls for examination and analysis of the indenture.

In the indenture, after purporting to 'give, grant, assign, set over and convey * * * all and singular my goods, chattels, effects and choses in action' to the trustees, 'to have and to hold said goods,' etc., '* * * and every part and parcel and increment thereof, and such as may be during my life obtained in exchange, lieu or stead thereof', Clark immediately thereafter limited such purported conveyance in these words: (1)

'* * * upon the following special trust, confidence, and express conditions, namely':

(a) 'That I, the said Silas H. H. Clark shall be permitted to *use, occupay and enjoy* all and singular said goods, * * * and every part and parcel thereof, as well as any and all increment arising therefrom, during my natural life, without paying anything for the same or in respect thereof,

(b) 'That from and after my decease, * * * the said trustees * * * *shall forthwith take, hold, manage and control* the goods, chattels and effects, and every part and parcel thereof, as well as any increment thereof'. (Emphasis ours.)

'The context clearly indicates that Clark had some particular purpose in his expressed limitation in reserving to himself the right to "use, occupy and enjoy" his property. Those are words of legal significance. The verb "use" is defined by Webster as "to convert to one's service", or "to avail oneself of" or "to put into operation" or "to cause to function". In Ex parte Smith, 212 Ala. 262, 102 So. 122, 125, "use" is said to mean, "to employ for any purpose". In Kennedy v. Pittsburgh & L. E. R. Co., 216 Pa. 575, 65 A. 1102, 1103, as to the meaning and scope of the verb 'use', respecting both real and personal property, it is said: 'The power to use the principal means the power to consume, and the power to consume real estate necessarily includes the power to convey'. The Century Dictionary defines the verb 'to use' as meaning 'to consume or expend'. The reserved dominion, as in the instant instrument, and under the instant circumstances, to use securities, money, personalty and choses in action, of necessity includes the right to employ it, invest it, expend and alienate it as desired.

The employment of the verb 'use', when not modified by words restricting such use to a particular purpose, includes its use in any form or in any manner. Mitchell v. Board of Curators of Morrisville College, 305 Mo. 466, 266 S.C. 481.

Likewise, the words of limitation used in (b), above, are highly significant and indicative of intention to pass no title in praesenti. Clark stated that 'from and after my death' (i.e., forward from Clark's death, but not before), the trustees, 'shall forthwith take, hold, manage and control' his property. In those words there is indicated every intention of Clark to withhold the passing of both title and possession until after his death. 'Forth' is defined by Webster as 'forward, onward in time'. 'Forthwith' is there defined as 'within a reasonable time'. Forthwith means thereafter, and within a reasonable time thereafter. In Empire Properties Corporation v. Manufacturers Trust Co., 262 App. Div. 166, 28 N.Y.S.2d 376, 379, 380, wherein the provisions of a trust indenture required the 'forthwith' cancellation of certain bonds under certain circumstances, the Court said: 'The word "forthwith" connotes a present or an immediately future cancellation and does not refer to bonds concededly cancelled long prior to the sale in question'. Clark intended that not until his death but that from and after his death, and within a reasonable time after his death, the trustees should take both title and possession; that the trustees then, but not until then, should 'take, hold, manage and control', his property. The words 'take, manage and control' used in (b), supra, are not theretofore used in the indenture. 'Take' is defined by Webster as, 'to get possession and control of'. In Whitworth v. Carter, 39

Ga. App. 625, 147 S.E. 904, 905, it is said: ' "To take," in a general sense, means to get or gain possession, where it was theretofore held by another."

By the words he used Clark intended the trustees, after his death, should *then* take title and possession of only such property as he should own at the time of his death. That Clark may have had a desire or intention that 'from and after' his decease a trust should then come into existence is not sufficient. To have effected a valid trust, as of the time of the execution of the indenture Clark must have parted with dominion over the legal title. Odom v. Langston, 355 Mo. 115, 195 S.W.2d 466, Eschen v. Steers, supra. That he did not do. Likewise, as of the time of the execution of the indenture the cestuis qui trust must have acquired an enforceable equitable interest in the trust res by the terms of the indenture itself. That they did not acquire. The terms of the indenture left the entire matter executory. There having been no delivery and having specifically retained to himself the use and enjoyment, and, as owner, being entitled to its possession and beneficial enjoyment, Clark could not change himself from such an owner with all attributes of possession and dominion, to that of a trustee holding for the beneficial enjoyment of another, unless the indenture, facts and circumstances unequivocally indicate he intended to make such a change in position. No such intention is indicated.

We agree with defendant's contention that a mere reservation of power to revoke, when not followed by actual revocation, does not impair a trust or render it invalid, if title actually passed to the trustees by execution of the indenture itself. Sims v. Brown,

252 Mo. 58, 158 S.W. 624. But while the words of conveyance in the opening paragraph and in the habendum of this indenture indicate an intention, mere expression of intention unaccompanied by actual passing of title in praesenti, or transfer of possession of the corpus, falls far short of creating a voluntary express trust.

"The above conclusion is supported by the persuasive construction which Clark and the trustees placed upon the indenture after November 9, 1898 and until Clark's death in 1900. Warne v. Sorge, 258 Mo. 162, 167 S.W. 967, 969, Harding v. St. Louis Union Trust Co., supra. Clark's complete dominion over, his use and alienation as desired of his assets, while not wholly controlling, deserve consideration. In one bank account alone, in Omaha, he deposited and mingled with his general funds many smaller amounts earmarked as income on securities. The record before us shows that he withdrew quite substantial amounts of $30,000 and $6,000, plainly to purchase new securities. He deposited large amounts, $16,800 and $14,040 obviously realized from the sale of securities owned and possessed by him before November 9, 1898. After Clark's death, but not until then, his trustees proceeded generally as executors and collected his assets, paid his bills and discharged the $83,500 in specific bequests.

* * * * *

"We hold that the instant indenture by its execution conveyed neither the legal nor equitable title to Clark's property. There is certainly no retention of title in Clark as trustee in this indenture. After its execution Clark's title to and dominion over his property was still absolute. The indentire therefore created no trust whatever, and was utterly void ab initio."

Restatement of the Law of Trusts, 2nd Edition.

"§26. *No Intention to Create a Present Trust.*

"A manifestation of intention to create a trust inter vivos at some time subsequent to the time of the manifestation does not create a trust.

"COMMENT:

"a. *Scope of the rule.* The rule stated in this Section is applicable whether the settlor manifests an intention to create a trust by transferring property to another person as trustee or by declaring himself trustee.

"Where the trust is to arise only on the death of the settlor, the disposition is testamentary and is invalid unless the requirements of the Statute of Wills are complied with. See § 56."

"§ 32. *Conveyance Inter Vivos in Trust for a Third Person.*

(1) Except as stated in Subsection (2), if the owner of property makes a conveyance inter vivos of the property to another person to be held by him in trust for a third person and the conveyance is not effective to transfer the property, no trust of the property is created.

(2) Not applicable.

"COMMENT:

"a. *Ineffective conveyance.* Where the owner of property makes a conveyance to another person as trustee, the conveyance may be ineffective to transfer title to the property. The conveyance may be ineffective for want of delivery of the subject matter or of a deed of conveyance. It may be ineffective because it is not intended to be presently effective.

(c) *No intention to make a present transfer.* If the owner of property surrenders possession of the subject matter or of a deed of gift which would be otherwise sufficient to transfer the property, but he does not manifest an intention to make a present transfer of the property, there is no present transfer of the property and no trust is created. See § 26."

"§ 56. *Disposition Inter Vivos Where Death of Settlor is a Condition Precedent.*

"Where no interest in the trust property is created in a beneficiary other than the settlor before the death of the settlor, the disposition is testamentary and is invalid unless the requirements of the Statute of Wills are complied with.

"COMMENT:

"a. *Scope of the rule.* Where the settlor makes a conveyance of property in trust, the intended trust may fall on the ground that it is not created prior to his death. This is the case where the conveyance is ineffective to transfer the property during his lifetime, or where although the conveyance is effective to transfer the property the beneficiary is not designated during his lifetime. The intended trust may fail, therefore, either (1) where the conveyance is incomplete for want of delivery or because it was not intended to be effective until the settlor's death; . . . No trust arises on his death unless the requirements of the Statute of Wills are complied with.

"b. *Conveyance incomplete at settlor's death.* If the owner of property purports to transfer it to another person in trust but the conveyance is incomplete at the time of his death, the intended trust is invalid unless

the provisions of the Statute of Wills are complied with. Thus, if the title to the property does not pass to the intended trustee because the conveyance is incomplete for want of delivery, no trust arises during his lifetime, and no trust arises on his death. So also, if the owner of property delivers it or delivers a deed of conveyance to the intended trustee, but he manifests an intention that the conveyance shall not be effective until his death, the disposition is testamentary . . . in all these cases the conveyance of the property is incomplete at the death of the owner, and no trust arises on his death since the disposition is testamentary, unless the requirements of the Statute of Wills are complied with."

Scott on Trusts.

"§ 56. *Disposition inter vivos where death of settlor is a condition precedent.* The owner of property may intend to create a trust of the property, either by transferring it to another person as trustee or by declaring himself trustee of it. In either event, if the beneficiaries do not acquire any interest in the property prior to his death, the transaction is clearly testamentary and invalid unless there is a compliance with the requirements of the Statute of Wills. If he intends to create a trust by transferring the property to another person as trustee, the beneficiaries may fail to acquire any interest during the lifetime of the settlor, either because of his failure during his lifetime to make an effective conveyance to the trustee or because, although the conveyance is effective, there is no effective disposition of the beneficiary's interest prior to his death.

"§ 56.1 *Conveyance incomplete at settlor's death.* If the owner of land executes a deed purporting to

convey the land to another, but manifests an intention that no interest is to vest in the grantee prior to the death of the grantor, the conveyance is incomplete, and on the grantor's death the grantee is not entitled to the land. The result is the same where the conveyance is to the grantee in trust for a third person; if the conveyance is incomplete at the grantor's death, neither the trustee nor the beneficiary takes any interest in the land. Thus a conveyance of land is ineffective where there is no delivery of the deed to the grantee or to a third person and the grantor retains control of the disposition of the property during his lifetime; and if the grantee is named as trustee for a third person, no trust arises.

"If the owner executes a deed and delivers it to the grantee, but it is provided in the deed that it shall have no effect until the grantor's death, the disposition is testamentary, and the grantee is not entitled to the land on the grantor's death. The result is the same where the deed is absolute on its face but it is delivered to the grantee under an agreement that it shall not be effective until the death of the grantor. In such a case if the conveyance is on trust, no trust arises on the grantor's death. If the owner executed a deed purporting to convey the land to another and then delivers it to a third person, with instructions to hold it for the grantor and to redeliver it to him on his request at any time during his lifetime, but if he should not otherwise direct to deliver it on his death to the grantee, the disposition is testamentary. This is because the grantor retains the power to control the disposition of the property as long as he lives. The result is the same whether the grantor in the deed reserves

a life interest or whether the deed is absolute on its face. If the conveyance is on trust, no trust arises on the grantor's death.

"The same principle is applicable to personal property. If the owner of securities or other personal property intends to make a gift of them but the gift is incomplete for lack of delivery or because the donor does not intend it to be effective until he dies, the donee takes nothing; and if the gift is intended to be upon trust for a third person, no trust arises."

"§ 103. *When is a Disposition Testamentary.*

"Whether the gift was testamentary or inter vivos will be decided upon the basis of *the rights and powers which the donor intended the donee to have,* and not merely by a consideration of the exact language in which the gift was framed. But certain phrases may tend to lead the court to find a testamentary intent, as where the subject matter of the fit is described as whatever property the donor has left at his death, or the donee is to take if he survives the donor. The court may also consider a statement by the donor in the instrument that it was or was not intended to be testamentary.

"Often the instrument in question contains an express statement that it is *"to take effect at the death* of the grantor."

Lawson, et al. vs. Lowengart, et al. 5/17/67 59 Cal. Rptr. 186, 193, 194, 195.

"Defendants contend that the trial court erred in its findings that there was not sufficient evidence to establish valid delivery of either the instrument or the trust corpus to the trustees. Delivery is largely a matter of the intent of the donor or trustor and is a ques-

tion of fact to be determined from the surrounding circumstances. (*Miller v. Jansen,* 21 Cal.2d 473, 132 P.2d 801). Under well established rules, the evidence is to be viewed in the light most favorable to plaintiffs and all reasonable inferences are to be drawn in favor of the determination of the trier of fact.

"Usually, the manifestation of the settlor's intent that the trust take effect immediately is evidenced by his delivery to the trustees of the subject matter of the trust or some act or an instrument indicating the settlor's relinquishment of dominion over the property. Where the means chosen is an instrument of transfer, the instrument must meet the requirements for a conveyance of the particular kind of property involved (*Bogert, Trusts & Trustees, 2d ed.,* §§ 141, 142, pp. 4-9; § 147, p.49; *1 Scott on Trusts, 2d ed.* § 32.2, p.251).

". . . Defendants, as the parties holding the affirmative and asserting the sufficiency of the gift in trust, had the burden of proving valid delivery to the trustees (*Code Civ.Proc.,* § 1981; *Blonde v. Estate of Jenkins,* 131 Cal.App.2d 682, 686, 281 P.2d 14).

"The actual or symbolic delivery of the securities was essential to complete the inter vivos trust. A delivery by instrument must have the intended effect of divesting the donor of all present control and vesting the trustees with an equitable present right to reduce the fund into possession (*Beebe v. Coffin,* 153 Cal.174, 177-178; 94 P.766). A delivery may be symbolic, such as delivery of a written instrument, without physical delivery of the securities themselves, so long as the instrument is one upon which delivery of the trust corpus might be compelled.

"The mere signing of the instrument by Dr. Maxwell did not constitute delivery nor create a presumption thereof (*Boyd v. Slayback,* 63 Cal.493; *Miller v. Jansen,* supra). * * * Possession by the grantor has been held to raise a presumption of nondelivery (*Tweedale v. Barnett,* 172 Cal.271, 156 P.483; *Lample v. McDougall,* 103 Cal.App.779, 285 P.328).

"The fact that Dr. Maxwell handed the instrument to Mr. Cotton after signing it, did not of itself constitute a delivery to him or authorize him to deliver the instrument to the trustees. The mere handing of an instrument to a third party does not comprise delivery or authorize that person to deliver the same to the assignee unless there are express and definite instructions to that effect and unless such directions are irrevocable and the instrument is placed beyond the assignor's power of control or recall (*Jeannerette v. Taylor,* 2 Cal.App. 2d 568 at p.570, 38 P.2d 831; *Estate of McConkey,* 33 Cal.App.2d 554 at pp. 560-561, 92 P.2d 456; *Bank of America v. Frost,* 205 Cal.App.2d 614, 23 Cal. Rptr.441; *Kunde v. Kunde,* 122 Cal.App.2d 624, 266 P.2d 608).

"If Dr. Maxwell had no intention of divesting herself of control at the time, the handing of the instrument to Mr. Cotton and his manumission of the instrument to the trustees would not constitute a constructive or symbolic delivery sufficient to establish the trust. The Delivery or absence of delivery to the trustees by way of the trust agreement was a question of fact to be determined by the trial court (*Blackburn v. Drake,* 211 Cal.App.2d 806, 27 Cal.Rptr.651). We have concluded upon a consideration of the entire record that the court's finding that Dr. Maxwell never intended or effected

delivery was sufficiently supported by the evidence." cf. *Pollard v. Pollard,* 166 Cal.App.2d 698 at pp. 702-703, 333 P.2d 456).

Blonde v. Estate of Jenkins, 281 P.2d 14

"The record is destitute of any evidence that appellant ever asserted any claim to the shares until after the death of Jenkins. Under such circumstances, the claim of a gift can be sustained only 'by clear and satisfactory evidence of every element which is requisite to constitute a gift.' " *Denigan v. Hibernia Savings & Loan Society,* 127 Cal.137, 141, 59 P.389, 390; *Hunble v. Gay,* 168 Cal.516, 520, 143 P.778.

"Gifts first asserted after the death of the alleged donor are always regarded with suspicion by the courts. Ibid. Because of the facility with which, after a donor is dead, a fraudulent claim of ownership may be founded on a pretended gift, assertedly made while the donor was living, it is but a salutory precaution which requires explicit and convincing evidence of every element that constitutes a valid gift inter vivos. *Sullivan v. Shead* 32 Cal.App. 369, 371, 162 P.925.

"In order to make a valid gift, a donor must not only make delivery and part with control of the object claimed, but the donor must at the same time have the intention to complete a presently effective gift and a delivery amounting to a presently effective gift and a delivery amounting to a present transfer of title. *Bishop's School Upon the Scripps Foundation v. Wells,* 19 Cal.App.2d 141, 146, 65 P.2d 105; *Knight v. Tripp,* 121 Cal.674, 678, 54 P.267; *In re Estate of McEuen,* 18 Cal.App.2d 180, 181, 63 P.2d 332. And that intention must be executed by a complete and uncondi-

tional delivery. *In re Estate of McEuen, supra; Sullivan v. Shea,* supra. The donee has the burden to prove the gift."

Scott on Trusts, Third Edition, § 8, Trust & Agency, p. 79.

A person may be both agent of and trustee for another. If he undertakes to act on behalf of the other and subject to his control he is an agent; but if he is vested with the title to property which he holds for his principal, he is also a trustee. In such a case, however, it is the agency relation which predominates, and the principles of agency, rather than the principles of trust, are applicable. This is the case, for example, where the title to bonds or shares of stock of other securities is vested in a person who undertakes to hold subject to the directions of the person who caused the property to be vested in him. He is an agent since he is acting subject to the control of another, even though he is also trustee since he is vested with the title to the property. Where an agent receives money for his principal, he acquires the legal title to the money according to the view that title to money passes with the possession of it; but he is nonetheless an agent, and the principles of agency are applicable.

Restatement of the Law, Agency, Second.

Sec. 14. B. Agency and Trust.

"Comment: c. Whether a person is a trustee, an agent, or an agent-trustee, depends upon the manifestation of intention of the parties. Frequently the intention of the parties is clear, but it is not always so. Which, if either, of the relations is created depends upon the con-

struction of the words used in the light of all the circumstances. If a person receives property from another who manifests an intention that the transferee is to hold the property for the benefit of and subject to the control of the transferor, an agency is created, whether or not title is transferred. * * * If he does not receive title to the property, and is not to act under the control of the other, he is neither an agent nor a trustee of the other.

"Comment f. Where a person transfers property to another, the question whether there is an agency depends upon the amount of control agreed to be exercised by the person for whose benefit the transferee is to act, or, in doubtful situations, upon the amount of control in fact exercised. If it is agreed that the transferor is to have general supervision and can, if he chooses, direct what is, or is not, to be done, an agency is indicated."

Betker v. Nalley, 140 F.2d 171.

"It is significant that no duty is specified, in the deed of June, 1930, to be performed by the trustees during the lifetime of the grantor, except to *hold* the two parcels. Moreover, this holding was to be for her use and benefit. The record shows that Mrs. Nalley occupied the residence located on parcel (1) as a home continuously until her death. Presumably, there was no duty to be performed by the trustees in connection with its management or control. In fact, the only suggestion of such a duty which can be found in the deed appears in the language of Paragraph (a) '* * * she to receive the entire net income therefrom.' This suggests the possibility that the trustees were to manage parcel (2),

collect the rents and distribute the net income therefrom to the granor. But even this possibility is not supported by the other provisions of the deed. It is apparent that Mrs. Nalley intended to retain management and control of the property as well as power to alienate it. She reserved power (1) to encumber it; (2) to direct the conveyance of the whole property or any part thereof, or any less estate therein, without any powers in her trustees to refuse to act upon her direction or to prevent, limit or control her direction; (3) to join in any such conveyance by signing and acknowledging the same. Her trustees were, in fact, mere agents with very limited powers."

Warsco v. Oshkosh Savings & Trust Co., 196 N.W. 829.

"A valid trust implies a donor, a trustee and a cestui que trust, and the donor may be the cestui que trust, or at least one of the cestui trustent. But there must be an alienation of the donor's property constituting the trust to the trustee, and under such terms that, when the trust is executed, a benefit accrues to a cestui que trust unless prevented by a condition subsequent resulting from a lawful revocation of the trust. If the donor has full control and dominion over the trust property, so that according to the terms of the trust he can use it as and when he pleases, the trustee becomes his mere agent to hold title to the property, invest, sell and collect income for him, and pay as he directs. The donor has parted with no dominion over his property nor any part thereof by the terms of the trust, and such an agreement is no valid trust instrument.

"The fundamental element of a trust is that the trust property, so long as the trust lasts, is irrevocably devoted to the benefit of certain specific purposes called cestuis que trustent, of whom the donor may be one. Some one must, by the execution of the trust be benefited in a manner or degree different from that which would have resulted had no trust been created. Hence an instrument whereby the donor retains or may retain the whole beneficiary interest in the trust property by the execution of the instrument according to its terms constitutes no valid trust. In such cases the so-called trustee is only the agent of the donor. And it has uniformly been held that a devise or bequest in trust which is subject to the future directions of the donor is void unless executed in conformity with the statute of wills."

Restatement of the Law, Second, Trusts 2d.

"Sec. 8. Trust and Agency.

An agency is not a trust.

"h. *Where the agent has title.*

The mere fact that an agent is entrusted not merely with possession but also with the title to property for his principal does not make applicable the rules which are applicable to trusts, but the rules applicable to agency are applicable."

Bogert, Trusts and Trustees, Second Edition.

"Sec. 15. Agency.

"If property is transferred inter vivos to one who is described as a trustee, with directions as to the disposition of the property on the death of the transferor, and the latter reserves to himself a high degree of con-

trol during his life, it may be found that the transaction amounted to the creation of an agency and not a trust, and that the attempted distribution of the property at the transferor's death was testamentary in character and void because of informality.

"If a transaction is called a trust but gives too much power to the settlor and leaves the so-called trustee a mere tool, it has been held that there is in reality a mere agency."

Monell v. College of Physicians & Surgeons, 17 Cal.Rptr. 744.

" 'A testamentary disposition of property is a disposition to take effect upon the death of the person making the disposition *and as to which he has substantially entire control until his death.* Such a disposition is testamentary whether made by a will or a document which purports to be a will or made by a transaction inter vivos, as by a deed, unsealed writing or parol declaration or transfer.' "

(Rest. 2d Trusts, Sec. 53, p. 130; see also 1 Scott on Trusts, Sec. 53, p. 61 * * * 'The result is the same where the agent is entrusted with title since such fact alone does not make applicable the rules which are applicable to the trusts instead of the rules applicable to agency.) (Rest. 2d Trusts, Sec. 8, Comment h; Rest 2d Agency, Sec. 14B; see 1 Scott on Trusts Sec. 57.2, pp. 449-451).'

"The last authority declares at page 451; 'If the transaction were one which would involve merely an agency but for the fact that the legal title is technically vested in the person entrusted with possession, it is clear that the disposition is testamentary.' "